THE
WORKING CONSTITUTION IN INDIA

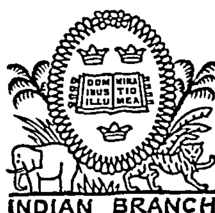
THE WORKING CONSTITUTION IN INDIA

A Commentary on the Government of India Act, 1935

[26 Geo. 5, Ch. 2]

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PREFACE

In 1921 the author published a short commentary on the Government of India Act, 1919, with the same title as the present work. The Government of India Act, 1935, has replaced that Act and the present edition has been entirely re-written. It is mainly intended for politicians and public men who want, in a handy form, short notes on the meaning and history of each section of the Act.

An Introduction at the head of an important Part or Chapter serves as a comparative study of the old and the new law, and explains the reasons for the change. Comparisons with the constitutions of the other members of the British Commonwealth of Nations and the United States of America have been made, and the writer acknowledges his indebtedness to Sir John Marriott and to Professor A. B. Keith whose books have been of very great help to him. Copious references to, and extracts from, the literature on the subject have been given. A detailed index will, it is hoped, add to the value of the book.

That India should speedily attain Dominion status and take her proper place as a member of the British Commonwealth of Nations has been the cherished hope of the writer, and after a careful study of the new Act, he is convinced that it contains germs of self-development of the Indian Constitution towards that goal.

He will consider his objects well achieved if this book leads the many public men who are trying to fit themselves for their country's service to a careful study of this splendid achievement of draftsmanship, and to a clear understanding of its underlying principles.

S. M. B.

November, 1938

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TABLE OF ABBREVIATIONS

Africa Act	..	South Africa Act, 1909—9 Edw. 7, c. 9.
Australia Act	..	Commonwealth of Australia Constitution Act, 1900—63 & 64 Vict., c. 12.
Butler Com. R.	..	Report of the Indian State Committee.
Canada Act	..	British North America Act, 1867—30 Vict., c. 3.
J.C.R.	..	Report of the Joint Committee on Indian Constitutional Reform, (Session 1933-34) Vol. I (Part I).
Keith	..	Keith's *Sovereignty of the British Dominions*, 1929.
Marriott	..	Marriott's *The Mechanism of the Modern State*, 1927.
M.C.R.	..	Montagu-Chelmsford Report on the Indian Constitutional Reforms.
May	..	Erskine May's *Parliamentary Practice* (13th ed.) 1924.
New Act	..	Government of India Act, 1935—26 Geo. 5, c. 2.
Old Act	..	Government of India Act—Government of India Act, 1915, as amended in 1916 and 1919.
Sim. Com. R.	..	Report of the Indian Statutory Commission.
W.P.	..	White Paper (Cmd. 4268 of 1933)—Proposals for Indian Constitutional Reform.
W.P. Intr.	..	Ditto, Introduction.
W.P. Prop.	..	Ditto, Proposals.

HISTORY OF THE ACT

1. The Government of India Act, 1919[1] was passed on 2 December 1919. It was provided in s. 45 of the Act that the amendments set out in Parts I and II of the Second Schedule to the Act and further consequential amendments are to be made in the Government of India Act, 1915[2] (as amended by the Government of India (Amendment) Act, 1916[3])—referred to as the Principal Act. The Principal Act as amended by the Act of 1919 was to be cited as the Government of India Act.

2. By s. 84A of the Principal Act, it was provided that within ten years from the passing of the Government of India Act, 1919, a statutory commission was to be appointed for the purpose of enquiring into the working of the system of government, the development of representative institutions and certain other matters, and of reporting as to the desirability of extending the principle of responsible government, including the question of the desirability of establishing second chambers in the Provinces.

3. On 26 November 1927, the Statutory Commission with Sir John Simon as chairman was appointed to enquire into the matters referred to in s. 84A of the Principal Act.

4. In 1929, an Interim Report of the Indian Statutory Commission was made. This was a review of the growth of education in British India by the Auxiliary Committee appointed by the Commission.

5. In 1928-9, the Report of the Indian States Committee (Butler Committee Report) was made.

6. On 12 May 1930, the Indian Statutory Commission made their Report.

7. In response to the suggestion made by Sir John Simon to the Prime Minister in October 1929, His Majesty's Government decided to invite, after the Report of the Statutory Commission was received, representatives of different parties and interests in British India and representatives of the Indian States to meet them for the purpose of conference and discussion in regard both to the British Indian and All-Indian problems.

8. In accordance with this decision, three sessions of the Indian Round Table Conference were held, the first from 12 November 1930 to 19 January 1931, the second from 7 September to 1 December 1931 and the third from 17 November to 24 December 1932.

9. On 19 January 1931, the last day of the session of the first Round Table Conference, the Prime Minister, Mr Ramsay Macdonald, made a declaration on behalf of His Majesty's Government, in which he stated *inter alia* that

> The view of His Majesty's Government is that responsibility for the Government of India should be placed upon legislatures, central and provincial, with such provisions as may be necessary to guarantee, during a period of transition, the observance of certain obligations and to meet other special circumstances, and also with such guarantees as are required by minorities to protect their political liberties and rights.

[1] 9 & 10 Geo. 5, c. 101. [2] 5 & 6 Geo. 5, c. 61. [3] 6 & 7 Geo. 5, c. 37.

> In such statutory safeguards as may be made for meeting the needs of the transitional period, it will be a primary concern of His Majesty's Government to see that the reserved powers are so framed and exercised as not to prejudice the advance of India through the new constitution to full responsibility for her own government.

He concluded by saying:

> Finally, I hope, and I trust, and I pray that by our labours together India will come to possess the only thing which she now lacks to give her the status of a Dominion among the British Commonwealth of Nations—what she now lacks for that—the responsibilities, and the cares, the burdens and the difficulties, but the pride and the honour of responsible self-government.

10. On 15 March 1931, His Majesty's Government published the White Paper [1] embodying their proposals for an Indian constitution, and they expressed their intention to invite both Houses of Parliament to set up a Joint Select Committee to consider these proposals in consultation with Indian representatives and to report upon them.

11. On 29 December 1931, in accordance with the recommendation of the Franchise Sub-Committee of the second Round Table Conference, the Indian Franchise Committee was appointed with the Marquess of Lothian as chairman. This Committee was to make complete and detailed proposals on which to base the revision of the franchise and the arrangement of constituencies for the new legislatures, central and provincial.

12. On 1 May 1932, the Indian Franchise Committee made its Report, and in 1932 the Report of the Indian States Enquiry Committee was published.

13. On 4 August 1932, the Communal Award was issued by His Majesty's Government. It was modified by (1) a later proposal for the creation of a new Province of Orissa, subsequently carried out in the new Act; and (2) by the so-called Poona Pact on 25 September 1932.

14. In April 1933, the Joint Parliamentary Committee (consisting of a Select Committee of the House of Lords appointed to sit with a Committee of the House of Commons) was formed to consider the future government of India and, in particular, to examine and report upon the proposals contained in the White Paper. The Committee was empowered to call into consultation representatives of the Indian States and of British India, and such representatives were invited to attend the deliberations of the Committee.

15. The Joint Parliamentary Committee presented its Report in October 1934.

16. On 31 July 1935, the Indian Delimitation Committee with Sir Laurie Hammond as chairman was constituted by His Majesty's Government to draw up a complete scheme of delimitation for the territorial constituencies for the election of members to the federal and the provincial legislatures, together with proposals regarding constituencies for women and labour, and the scheduled castes, proposals for the nature and location of the constituencies to be established for the return of certain special interests and also proposals dealing with the qualification of voters, conduct of elections and qualifications necessary for candidature.

17. On 23 January 1936, the Indian Delimitation Committee made its Report.

[1] Cmd. 4268 of 1933.

18. In February 1935, the new Government of India Bill was introduced in Parliament.

19. On 2 August 1935, the Government of India Act[1] was passed. This Act consisted of 478 sections, including sections 320–476 which referred exclusively to Burma.

20. On 20 December 1935, the Government of India (Reprinting) Act[2] was passed to divide the Government of India Act, 1935, into two portions, one dealing exclusively with India, and the other with Burma. The two portions are now styled the Government of India Act, 1935 and the Government of Burma Act, 1935. In the Government of India (Reprinting) Act, 1935, it was provided that the Clerk of the Parliament is to prepare two documents, one with the sections dealing with India, and the other with those dealing with Burma, renumbering all the sections where necessary and making certain alterations. The Clerk is to certify each of the said documents as if it were a separate Act and the said documents are to be printed as separate Acts. It was further provided that the date to be endorsed on the said documents was to be 2 August 1935, being the date of the passing of the Government of India Act, 1935—25 & 26 Geo. 5, c. 42—and the said documents are to be deemed Acts of Parliament which received the Royal Assent on that date, and shall have effect as if the Government of India Act—25 & 26 Geo. 5, c. 12—had never been passed.

21. The present Act dealing with India is the Government of India Act, 1935—26 Geo. 5, c. 2—which is to be deemed as passed on 2 August 1935.

22. The Act dealing with Burma is the Government of Burma Act, 1935—25 Geo. 5, c. 3.

23. Sir Otto Niemeyer was appointed to make recommendations to His Majesty's Government on matters which, under ss. 138(1) and (2), 140(2) and 142 of the Government of India Act, 1935, have to be prescribed or determined by His Majesty in Council (subject to the approval of Parliament), regarding the allocation of income-tax between the Federation and the Provinces and between the Provinces themselves, the jute-tax, and subvention from the Federation to the Provinces.

24. The Niemeyer Report was made on 6 April 1936.

25. Under s. 308(4) of the Government of India Act, 1935, certain minor amendments in the Fifth and the Sixth Schedules of the Act have been made by the Government of India (Provincial Legislative Assemblies) Order in Council, 1936.

[1] 25 & 26 Geo. 5, c. 42.

[2] 26 Geo. 5, c. 1.

PART I

INTRODUCTORY

An Act to make further provision for the government of India. [2nd August 1935]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I

INTRODUCTORY

Short title

1. This Act may be cited as the Government of India Act, 1935.

Repeals[1]

The old Act known as the Government of India Act has been repealed. By s. 45(2) of the Government of India Act, 1919,[2] it was provided that every enactment and word directed by the Government of India (Amendment) Act, 1916, or by that section and the Second Schedule to the Act of 1919, to be substituted for, or added to any portion of the Government of India Act, 1915, shall form part of the Government of India Act, 1915, and by s. 45(3) of the Act of 1919, it was provided that the Government of India Act as so amended may be cited as the Government of India Act. The Government of India Act, 1919,[3] has been wholly repealed except the preamble[4] and s. 47(1) which runs thus:

47(1). This Act may be cited as the Government of India Act, 1919, and the Principal Act, as amended by any Act for the time being in force, may be cited as the Government of India Act.

By s. 292 of the new Act, it is provided that notwithstanding the repeal by this Act of the Government of India Act, all laws in force in British India immediately before the commencement of Part III of this Act, subject to the provisions of this Act, continue in force till altered by competent authority and His Majesty by Order in Council, under s. 293 may, at any time after the passing of this Act, provide that a law in force in British India shall continue, until repealed or amended, subject to any modifications as appear necessary to His Majesty. S. 317 of this Act makes transitory provisions for the continuance of certain provisions of the Government of India Act, as specified in the Ninth Schedule, notwithstanding the repeal of that Act by this Act.

The preamble

The Act does not contain any preamble. The Bill, when introduced in Parliament, was intended to repeal the whole of the Government of India Act, 1919. During the passage of the Bill in Parliament, it was decided to retain

1 See s. 478 and the Sixteenth Schedule.

2 9 & 10 Geo. 5, c. 101.

3 9 & 10 Geo. 5, c. 101.

4 *Infra*.

the preamble and s. 47(1) of the Act of 1919 and to amend the Schedule of amendment to this Act accordingly.

The preamble to the Act of 1919 runs thus:

> Whereas it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the gradual development of self-governing institutions, with a view to the progressive realisation of responsible government in British India as an integral part of the empire:
>
> And whereas progress in giving effect to this policy can only be achieved by successive stages, and it is expedient that substantial steps in this direction should now be taken:
>
> And whereas the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian peoples:
>
> And whereas the action of Parliament in such matters must be guided by the co-operation received from those on whom new opportunities of service will be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility:
>
> And whereas concurrently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those Provinces in provincial matters the largest measure of independence of the Government of India, which is compatible with the due discharge by the latter of its own responsibilities.

History of the preamble

On 20 August 1917, the Rt. Hon. Mr E. S. Montagu, Secretary of State for India, made the following announcement in the House of Commons:

> The policy of His Majesty's Government with which the Government of India are in complete accord, is that of the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realization of responsible government in India as an integral part of the British Empire. They have decided that substantial steps in this direction should be taken as soon as possible, and that it is of the highest importance as a preliminary to considering what these steps should be that there should be a free and informal exchange of opinion between those in authority at home and in India. His Majesty's Government have accordingly decided, with His Majesty's approval, that I should accept the Viceroy's invitation to proceed to India to discuss these matters with the Viceroy and the Government of

India, to consider with the Viceroy the views of local Governments, and to receive with him the suggestions of representative bodies and others.

I would add that progress in this policy can only be achieved by successive stages. The British Government and the Government of India, on whom the responsibility lies for the welfare and advancement of the Indian peoples, must be judges of the time and measure of each advance, and they must be guided by the co-operation received from those upon whom new opportunities of service will thus be conferred and by the extent to which it is found that confidence can be reposed in their sense of responsibility.

Ample opportunity will be afforded for public discussion of the proposals, which will be submitted in due course to Parliament.

In the Montagu-Chelmsford Report (paragraph 7), the above words were taken to be the most momentous utterances ever made in India's chequered history, and it was stated in the paragraph: 'They pledge the British Government in the clearest terms to the adoption of a new policy towards three hundred millions of people. . . . . The announcement marks the end of one epoch and the beginning of a new era.'

In the Report of the Joint Select Committee on the Government of India Bill (1919), the following statement was made:

> The preamble of the Bill, as drafted, was based on the announcement of His Majesty's Government in Parliament of the 20th August 1917, and it incorporated that part of the announcement which pointed to the progressive realization of responsible government in British India as an integral part of the Empire, and to the expediency of gradually developing self-governing institutions in India, and it referred to the granting to the provinces of India of a large measure of independence of the Government of India. It did not, however, deal with those parts of the announcement which spoke of the increasing association of Indians in every branch of the administration and declared that the progress of this policy could only be achieved by successive stages, and that Parliament, advised by His Majesty's Government and by the Government of India, on whom the responsibility lies for the welfare and advancement of the Indian people, must be the judges of the time and measure of each advance, and be guided by the co-operation received from those upon whom new opportunities of service are conferred and by the extent to which it is found that confidence can be reposed in their sense of responsibility.
>
> The Committee have enlarged the preamble so as to include all parts of the announcement of the 20th August 1917. Their reason for doing so is that an attempt has been made to distinguish between the parts of this announcement and to attach a different value to each part according to opinion. It has been said, for instance, that whereas the first part is a binding pledge, the latter part is a mere expression of opinion of no importance. But the Committee think that it is of the utmost importance, from the very inauguration of these constitutional changes, that Parliament should make it quite plain that the responsibility for the successive stages of the development of self-government in India rests on itself and on itself alone, and that it cannot share this responsibility with, much less delegate it to, the newly-elected legislatures of India.

In the Report of the Joint Parliamentary Committee[1] it was stated:

> But, above all, in the preamble to the Act of 1919, Parliament has set out, finally and definitely, the ultimate aims of British rule in India. Subsequent statements of policy have added nothing to the substance of the declaration, and we think it well to quote it here in full, as settling once and for all the attitude of the British Parliament and people towards the political aspirations of which we have spoken.

Responsible government

The preamble to the Government of India Act, 1919, laid down that the goal was the progressive realization of responsible government in British India as an integral part of the Empire. The Instrument of Instructions to the Governor-General under the old Act stated: 'For, above all things, it is Our will and pleasure that the plans laid by Our Parliament . . . . may come to fruition to the end that British India may attain its due place among Our Dominions.' Lord Irwin, Viceroy of India, in October 1929, speaking with the full authority of His Majesty's Government, declared that it was 'implicit in the declaration of 1917 that the natural issue of Indian constitutional progress, as there contemplated, is the attainment of Dominion Status'. The Secretary of State, Sir Samuel Hoare, stated in Parliament that His Majesty's Government accepted the interpretation put on the preamble by Lord Irwin. As observed by Professor A. Berriedale Keith: 'Applied to Dominion condition, responsible government demands that the powers of the Crown or its representative, whether resting on the prerogative or on statute, must be exercised on the advice of ministers.' Responsible government thus implies parliamentary government.

Meaning of preamble

The preamble to an Act has been said to be a good means of finding out its meaning, and is, as it were, a key to the understanding of it[2]; and as it usually states the general object and intention of the legislature in passing the enactment, it may be legitimately consulted to solve any ambiguity. But the preamble cannot either restrict or extend the enacting part when the language and the object and scope of the Act are not open to doubt[3]: see *Powell* v. *Kempton Park Racecourse Co.*[4]

Canon of construction

In *A.G. Ontario* v. *A.G. Canada*[5] the canon of construction for Acts providing for the constitution of self-governing units in the British Commonwealth of Nations was thus laid down:

> In the interpretation of a completely self-governing constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit, the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed on some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some parts

[1] Par. 12. [2] Maxwell, *Interpretation of Statutes*, 7th ed., 1929, p. 37.
[3] Ibid., p. 39. [4] [1899] A.C. 143 at p. 185. [5] [1912] A.C. 571 at p. 583.

of His Majesty's Dominions outside Canada) or otherwise is clearly repugnant to its sense.

Orders in Council[1]

Orders in Council are the general medium by which the powers of the Crown—prerogative or statutory—are exercised. 'They are formulated by the various ministers or departments concerned with the particular matter to which the Orders relate, and their general policy is determined by the Cabinet. They are expressed to be made by the Sovereign by and with the advice of the Privy Council at meetings and are signed by the Clerk of the Council.' Orders in Council are now largely used for the purpose of completing the administrative part of Acts. They are generally issued in a complete form from the department concerned, the authorization of the Privy Council being a mere formality. In *The Zamora*[2] case, Lord Parker said:

> The idea that the King in Council, or indeed any branch of the executive has power to prescribe or alter the law to be administered by Courts of Law in this country is out of harmony with the principle of our constitution. It is true that under a number of modern statutes, various branches of the executive have powers to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity.

Under s. 309 of this Act, it is provided that any power conferred by this Act on His Majesty in Council shall be exercised only by Order in Council, and that the Secretary of State is to lay before Parliament the draft of any Order proposed to be recommended to His Majesty and the Order will only be made when an address is presented to His Majesty by both Houses praying that the Order may be made in a certain form. As to the legal effect of such Order in Council, the following passage is quoted from Maxwell's *Interpretation of Statutes*[3]:

> Rules made under an Act which prescribes that they shall be laid before Parliament for a prescribed number of days, during which period they may be annulled by a resolution of either House, but that if not so annulled they are to be of the same effect as if contained in the Act, and are to be judicially noticed, must be treated for all purposes of construction or obligation or otherwise, exactly as if they were in the Act. If there is a conflict between one of these rules and a section of the Act, it must be dealt with in the same spirit as a conflict between two sections of the Act would be dealt with. If reconciliation is impossible, the subordinate provision must give way, and probably the rule would be treated as subordinate to the section.

It will be noted that an Order in Council under the Act has the actual approval of both Houses of Parliament, and not merely no disapproval. The Order will not be regarded merely as a rule which can be attacked on the ground that it was not within the power of those who made it. If there be any conflict between the Act and an Order in Council, attempt should be made to reconcile them. If that is not possible, which is the

[1] See Halsbury, *Laws of England*, 2nd ed., Vol. VI, art. 765.
[2] [1916] 2 A.C. 77 at p. 90.
[3] 7th ed., 1929.

leading provision, and which the subordinate provision, and which must give way to the other, will have to be determined.[1]

Royal Sign Manual

The Royal Sign Manual is the Royal signature. Orders, warrants, and commissions under the Royal Sign Manual are used under the powers conferred by common or statute law, and relate to a variety of matters, e.g. the appointment of executive officers, such as the Governor-General,[2] the ordinary members of his Executive Council,[3] the Governors of Presidencies,[4] the Advocate-General,[5] members of the Governor's Executive Council,[6] the Commander-in-Chief,[7] the appointment and removal of judges.[8] In these cases, the Sign Manual would require the addition of one of the secretarial seals.[9]

Meaning of Act

The statute must be read and construed as a whole. If the meaning is plain, no regard is to be paid to the previous law. The language of the Act is to be interpreted by one uninfluenced by any consideration derived from the previous state of the law. If the meaning, however, is doubtful, reference may be made to the previous state of the law as an aid to the construction of the provisions of the Act.[10] But in the construction of a statute, the policy which dictated the statute may be taken into account.[11]

Proceedings of the Legislature

Proceedings which resulted in the passing of the Act cannot be called in as aid in the interpretation of any section of the statute: *Administrator General* v. *Premlal*[12]; *South Eastern Railway* v. *Railway Commissioners*[13]; *R.* v.

[1] See the observations of Lord Herschell L.C.J. in *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347 at p. 360. See the Interpretation Act, 1889 (52 and 53 Vict., c. 63), s. 31.

[2] Old Act, s. 24, and new Act, s. 3.

[3] Old Act, s. 36(1).

[4] Old Act, s. 46(2), new Act, s. 48(1).

[5] Old Act, s. 114(1).

[6] Old Act, s. 47(1).

[7] New Act, s. 4.

[8] New Act, ss. 200(2) and 220(2).

[9] Halsbury, 2nd ed., Vol. VI, art. 766.

[10] *Bank of England* v. *Vagliano*, [1891] A.C. 107 at pp. 144-5; *Administrator General* v. *Premlal*, (1895) 22 Cal. 788, 22 I.A. 107; *Narendranath* v. *Kamalbashini*, (1896) 23 Cal. 563, 23 I.A. 18; *Krishna Ayyangar* v. *Nallaperumal* (1920), 47 I.A. 33.

[11] *The King* v. *Hall*, [1822] 1 B. & C. 123 at p. 136 per Abbot, C.J.; *Hine* v. *Reynolds*, [1840] 2 Scott (N.R.) 394 at p. 409 per Sergeant Stephen *arguendo*; *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627, at p. 634, where Lord Hobhouse said: 'It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law.' For some rules of construction, see the observations of Lord Wensleydale in *Grey* v. *Pearson* (1857), 6 H.L.C. 61 at 106 (grammatical sense and order are to be followed unless absurdity or inconsistency follows); of James L.J. in *Greaves* v. *Tofield* (1880), 14 Ch.D. 563 at p. 571 (a phrase used in a former Act and explained by decisions, used in subsequent Act on the same subject and for the same purpose, has the same meaning): cf. *Barras* v. *Aberdeen Steam Trawling Co.*, [1933] A.C. 402 at p. 447; of Lord Hobhouse in *Simms* v. *Registrar of Probates*, [1900] A.C. 323 (Courts are to construe an Act according to its true meaning though very harsh; but where two meanings are equally possible the less harsh may be preferred).

[12] *Supra.*

[13] (1881) 50 L.J. (Q.B.) 201, C.A. per Lord Selborne, L.C.J., at p. 203 where he stated that the House of Lords regretted that the Court of Appeal in *R.* v. *Bishop of Oxford* (1879), 4 Q.B.D. 525 at pp. 534, 535, 576 and 599, had allowed the speech of Lord Cairns upon the third reading of the Public Worship Regulation Act, 1874, to be read.

Board of Education.[1] So it would appear that the White Paper, the Report of the Joint Parliamentary Committee and the Government of India Bill as originally introduced in Parliament, and other documents in connexion with the Act would all be inadmissible in construing the Act. But it is submitted that this is not an ordinary statute, but one which is in the nature of a treaty between the various federating units, and so the ordinary rules should be relaxed. The policy underlying the statute, as explained in the documents on which the Act and the various Orders and rules thereunder were based, may be taken into account. In considering the interpretation of a Patent Act in *Eastman Photographic Materials* v. *Comptroller General of Patents,*[2] Lord Halsbury, L.C.J., quoting at length from the Report of a Royal Commission (on whose recommendation the Act was passed), remarked: 'No more accurate source of information as to what was the evil or defect which the Act of Parliament now under consideration was intended to remedy could be imagined than the Report of that Commission.' He quoted with approval the canons of construction laid down by Sir Edward Coke in *Haydon's Case,*[3] and also the observations of Turner, L.J., in *Hawkins* v. *Gathercole,*[4] that the intention of the legislature must be regarded, and judges have collected this intention sometimes by considering the cause and necessity of making the Act, sometimes by foreign (i.e. extraneous) circumstances: 'so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion. . . . We have therefore to consider not merely the words of this Act of Parliament, but the intent of the legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can be justly considered to throw light upon the subject.' Lord Halsbury also cited with approval the following observations of Lord Blackburn in *River Wear Commissioners* v. *Adamson*[5]: 'In all cases the object is to see what is the intention expressed by the words used. But from the imperfections of language, it is impossible to know what that intention is without enquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from the circumstances which the person using them had in view.' Lord Langdale's statement in the *Gorham Case*[6] has often been cited with approval. He said: 'We must endeavour to attain for ourselves the true meaning of the language employed—assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instrument relates, and the meaning of the words employed.' See the observations on this point by Lord Blackburn in *Bradlaugh* v. *Clarke*[7] and of Lord Wright in *Assam Railway* v. *Commissioners of Inland Revenue.*[8] Counsel in the latter case sought to refer, in aid of interpretation of income-tax provisions of the Finance Act, to the recommendations of the Royal Commission on Income-tax, on whose suggestions those provisions were framed; but Lord Wright was of opinion that on principle no such evidence of showing the intention, i.e. the purposes or objects of an Act, was admissible, and that the

1 [1909] 2 K.B. 1045 at pp. 1057, 1072.
2 [1898] A.C. 571 at p. 575.
3 (1584) 3 Co. Rep. 7b.
4 (1855) 6 DeG.M. and G. 1, at p. 21.
5 (1877) 2 A.C. 743 at p. 763.
6 Moore's 1852 edition, p. 462.
7 (1882) 8 A.C. 354 at p. 372.
8 [1935] A.C. 445 at p. 457.

intention of the legislature was to be ascertained from the words of the statute, with such extraneous assistance as was legitimate. Referring to the observations of Lord Halsbury quoted above, Lord Wright observed: 'Lord Halsbury, it is clear, was treating the Report as extraneous matter to show what were the surrounding circumstances with reference to which the words were used, so that the case came within the principle stated by Lord Langdale. The rule is in principle analogous to the rules laid down in the resolutions of the Barons of the Exchequer recorded in *Haydon's Case*.' In *British Coal Corporation* v. *The King*,[1] the Lord Chancellor quoted the statement in the Report of the Imperial Conference, 1926, that 'It was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of that part of the Empire primarily affected'. This case involved the interpretation of the Statute of Westminster, and the Lord Chancellor in his speech cited the passage from the Report of the Imperial Conference which was one of the factors leading to the passing of that statute. It may be noted that Lord Wright was a member of the Board. This statute was a peculiar enactment which was in the nature of a treaty or an agreement between the Dominions. It is thus analogous to the Government of India Act, 1935, which is in the nature of a treaty regulating the constitutional relation between a number of units forming Federal India—the Federation, the Indian States and the Provinces. So it is submitted on the principle of the cases cited above, that in interpreting the intention and the policy of the Act and the various Orders in Council made thereunder, the various documents leading up to them may be referred to.[2]

Marginal notes

Marginal notes cannot be referred to for the purpose of construing the Act. They are not to be taken as part of the statute.[3]

Heading

The heading of a group of sections cannot be construed as limiting the effect of plain words in a section contained in that group. 'The correct view of prefatory words of this kind', said Farwell, L.J., in *Fletcher* v. *Birkenhead Corporation*,[4] 'is expressed in *Maxwell on the Interpretation of Statutes*, 4th ed., p. 75: "The function of the preamble is to explain what is ambiguous in the enactment, and it may either restrain or extend it as best suits the intention. The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections."' Headings at the commencement of certain sections cannot restrain or confine the natural operation of the words found in these sections—according to Lord Cairns in *Hammersmith Railway* v. *Brand*.[5] The headings are, however, not to be treated as marginal notes; they con-

[1] [1935] A.C. 500 at p. 523.

[2] See the article on the Statute of Westminster by Dr Jennings in the *Law Quarterly Review*, Vol. LII, No. 206 (April 1936), and notes above under MEANING OF ACT.

[3] *Claydon* v. *Green* (1868), L.R. 3 C.P. 511 at p. 519 per Bovill C.J., and at pp. 521-22 per Willes J.; *Thakurani Balraj* v. *Rae Jagatpal* (1904), 8 C.W.N. 699 (P.C.): 31 I.A. 132; *Lang* v. *Kerr Anderson & Co.* (1878), 3 App. Cas. 529 at p. 536 per Lord Cairns; *Sutton* v. *Sutton* (1883), 22 Ch.D. 511 at p. 513 per Jessel M.R.; but see *Bushell* v. *Hammond* (1904), 73 L.J.K.B. 1005 at p. 1007 per Collins M.R. who said that the side-note, though no part of the section, is of some assistance as it shows the drift of the section.

[4] [1907] 1 K.B. 205 at p. 218.

[5] (1868) L.R. 4 H.L. 171 at p. 216.

stitute an important part of the Act itself and may be read not only as explaining the sections which immediately follow, as a preamble to a statute may be looked at to explain its enactments, but as affording a better key to the construction of the sections which follow them than might be afforded by a mere preamble.[1]

2.—(1) All rights, authority and jurisdiction heretofore belonging to His Majesty the King, Emperor of India, which appertain or are incidental to the government of the territories in India for the time being vested in him, and all rights, authority and jurisdiction exercisable by him in or in relation to any other territories in India, are exercisable by His Majesty, except in so far as may be otherwise provided by or under this Act, or as may be otherwise directed by His Majesty. *Government of India by the Crown*

Provided that any powers connected with the exercise of the functions of the Crown in its relations with Indian States shall in India, if not exercised by His Majesty, be exercised only by, or by persons acting under the authority of, His Majesty's Representative for the exercise of those functions of the Crown.

(2) The said rights, authority and jurisdiction shall include any rights, authority or jurisdiction heretofore exercisable in or in relation to any territories in India by the Secretary of State, the Secretary of State in Council, the Governor-General, the Governor-General in Council, any Governor or any Local Government, whether by delegation from His Majesty or otherwise.[2]

The Act makes provision for the formation of a federal polity for all India, embracing both the Indian States and the British Indian Provinces. The Act sets out in detail the powers, i.e. the jurisdiction and the competence, of the federal and the provincial authorities. As the Joint Committee Report[3] says: 'In the constitution in which the Provinces are to be federally united under the Crown, not only can the Provinces no longer derive their powers and authority from devolution by the central Government, but the central Government cannot continue to be an agent of the Secretary of State. Both must derive their powers and authority from a direct grant by the Crown.' This section therefore provides for the resumption into the hands of the Crown of all rights, authority and jurisdiction in and over the territories of British India.

[1] See *Eastern Counties* v. *Marriage* (1860), 9 H.L. Cas. 32 at p. 41 per Channell B.

[2] See old Act, ss. 1 and 131; for the dominion and authority of the Crown, see M.C.R. 297; Butler Com. R., 67 and 106; Sim. C.R. Vol. II, 229; W.P. Intr. 9, 10 and 14; W.P. Prop. 2-3; J.C.R. 152, 153, 158, 164 footnote, and 409.

For the position and power of the Secretary of State, see old Act, ss. 2 and 3; W.P. Prop. 20, 21, 72 and 73; J.C.R. 110 and 152.

[3] Par. 153.

Prior to the passing of this Act, all these powers and rights were vested in the various authorities mentioned in sub-section (2).

Under the old Act, s. 1, the territories vested in His Majesty in India are governed by, and in the name of, His Majesty the King-Emperor. On the repeal of the old Act, all powers appertaining and incidental to the government of British India are to vest in the Crown; and the powers of the Crown will be exercised by the Governor-General, the Governors and other appropriate authorities established under this Act.[1]

Cl. (1)

The rights, authority and jurisdiction of the Crown in India, as pointed out in the Report of the Joint Parliamentary Committee,[2] fall under two distinct heads: those in and over the territories of British India; and those possessed elsewhere in India, including rights which are comprehended under the name 'Paramountcy'.

I. As regards such rights, authority and jurisdiction, the Secretary of State for India, under the old Act, had the power to superintend, direct and control all acts and concerns relating to the government or the revenues of India. He was the Crown's responsible agent for the exercise of all the authority vested in the Crown in relation to the affairs of British India and for the exercise of certain authority directly derived from powers formally vested in the Court of Directors and the Court or Proprietors of the East India Company. The superintendence and control of the civil and military government of British India was vested in the Governor-General in Council, who was to pay due obedience to all orders received from the Secretary of State.[3] Under s. 45 of the old Act, every local Government was to obey the orders of the Governor-General in Council and to keep him constantly informed of its proceedings and was under his superintendence, direction and control in all matters; thus the Secretary of State through the Governor-General in Council controlled the local Governments. Under s. 45A of the old Act, provision could be made by rules for the devolution of authority in respect of provincial subjects to local Governments. Thus the administrative control of British India under the old Act, centred in the Secretary of State or the Secretary of State in Council; and the powers of the provincial Governments in India were derived, under the old Act, through the central Government by a species of delegation from this central authority and were exercised subject to the control of the Secretary of State.

Under the new constitution, the principle of federation has been accepted, and the autonomous Provinces in British India are to be federally united under the Crown, and, as pointed out in the Joint Committee Report,[4] these Provinces can no longer derive their powers and authority by devolution by the central Government, and the central Government cannot continue to be the agent of the Secretary of State. Both the provincial and the central Government under the new Act derive their powers and authority from a direct grant by the Crown. So the present legal position of the re-constituted Government of India is: (1) the resumption into the hands of the Crown of all rights, authority and jurisdiction in and over the territories of British India, whether vested under the old Act in the Secretary of State, the Governor-General in

[1] See notes under sub-cl. (2) below, and PREROGATIVE POWERS, and Introduction to Part II, Chapter I under INDIAN STATES.

[2] Par. 158.

[3] See ss. 2 and 33, old Act.

[4] Par. 153.

Council or in the provincial Governments; and (2) their redistribution in the manner prescribed in the new Act between the central Government and the provincial Governments. Under the new constitution, the executive power and authority of the Federation vests in the Governor-General as the representative of the King; similarly the whole executive power and authority of the Province vests in the Governor as the representative of the King. So it is provided by s. 7 of the new Act that the executive authority of the Federation is to be exercised on behalf of His Majesty by the Governor-General; and s. 49 provides that the executive authority of a Province is to be exercised on behalf of His Majesty by the Governor.

Paramountcy

II. The Crown also possesses rights, authority and jurisdiction (outside British India) over the Indian States as the *Paramount Power*. The Act does not define the nature and extent of these powers. The rights referred to in this clause rest on treaties entered into by the East India Company except in so far as they have been subsequently modified by treaty, usage or sufferance or the practice of the Political department of the Government of India. In the early stages of the British rule, the treaties between the East India Company and some of the important States such as Hyderabad, Baroda, Gwalior and Travancore were 'treaties of mutual amity, friendly co-operation and reciprocal obligation' between two parties enjoying, theoretically at any rate, equality of status. After 1813, the treaties were 'of subordinate co-operation, alliance and loyalty'. Apart from these two classes of States, there are also petty chiefs whose title depends either on the recognition of their status by the Crown or on a *sanad*, i.e. a concession, or acknowledgement of authority or privilege, generally coupled with conditions, proceeding from the Paramount Power. The Crown, however, treats all States alike, making no difference between the treaty States and the petty Principalities, except perhaps in the salute list, which, as Lord Chelmsford once observed, 'however arbitrary and meaningless, was the only possible basis of distinction'.

Sovereign power has a double aspect: it is independent of control from without and is paramount over all action within.[1] To the relationship between the Crown and the States neither international law nor municipal law has any application. The Crown's present relations are not on a purely contractual basis. Originally the powers of the Crown were based on treaties, but the treaties have never been modified or revised. Although the Crown has never treated the treaties as abrogated, it has always successfully claimed the exclusive right of interpreting the treaties in the light of modern conditions, and, in consequence, the Crown has asserted rights and privileges, not always warranted by the treaties. This device of constructive interpretation has considerably added to the powers of the Crown over the Indian States. The rights of the Crown have been considerably supplemented by the custom and practice of the Political department. Usage also has shaped and developed the relationship between the Crown and the Indian States, and usage and sufferance have operated from the earliest times to determine the exact degree of control which the Crown possesses over them. Where treaties are silent, usage is a valuable evidence as to what the parties intended should be their respective rights. There is a division of

[1] See Part II, Chapter I, Introduction under INTERNAL AND EXTERNAL SOVEREIGNTY: HAVE THE STATES INTERNATIONAL STATUS?

internal sovereignty between the Paramount Power and the States, but the sovereignty of the Crown is supreme in India, and 'its supremacy is not based only upon treaties and engagements but exists independently of them',[1] and every Indian State is subject to the right of the paramountcy of the Crown.[2] Holding that it was impos ible to define the 'Crown's Paramountcy', the Butler Committee observed as follows: 'Conditions alter rapidly in a changing world. Imperial necessity and new conditions may at any time raise unexpected situations. Paramountcy must remain paramount. It must fulfil its obligations, defining or adapting itself according to the shifting necessities of the time and the progressive development of the States.' These powers of the Crown[3] which cannot be defined with any exactitude but which have hitherto been exercised by the Governor-General in Council under general control of the Secretary of State are now resumed by the Crown.

Jurisdiction over railways

The Crown assumes jurisdiction which the Government of India had hitherto exercised over the railways belonging to the Indian States. That jurisdiction having been acquired by the Crown through a series of treaties or by the exercise of the rights of paramountcy, is not automatically transferred to the Federal Government. If a State should not agree to the transfer of such jurisdiction to the Federation, it is of course open to the Crown to refuse the accession of the State to the Federation. It is open to His Majesty's representative in exercise of the functions of the Crown in its relations with Indian States to entrust to the statutory railway authority the performance of any function in relation to railways in a non-federated State.[4]

The proviso makes it clear that the powers of the Crown in the field of paramountcy cannot be delegated to any person other than His Majesty's Representative or persons under his authority. But certain matters which had hitherto been determined between the States and the Crown will, under the Act, be regulated, to the extent that States accede to the Federation, by the legislative and the executive authority of the Federation, and His Majesty's representative will have nothing to do with this matter. But in other matters and in all respects as regards non-federating States, paramountcy will be unaffected by the Act and will be exercised by the Viceroy and persons under his authority.[5]

'India' is defined in s. 311(1). 'The territorial property of a State consists in the territory occupied by the State community; and it comprises the whole area, whether of land or water, included within definite boundaries, ascertained by occupation, prescription or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion and when such area abuts upon the sea together with a certain margin of water.'[6] The territory of a State includes its territorial waters. As to the British doctrine of territorial waters and its marine league limit, see the Territorial Waters Jurisdiction Act.[7] Prior to that, in *Anglo-American Telegraph Co.* v. *Direct United States Co.*[8] it was held that territorial waters follow an imaginary line three miles from the extremity of the land. The sovereignty and property in the soil

[1] Lord Reading.

[2] See in this Introduction under PREROGATIVE POWERS: PARAMOUNTCY.

[3] For a fuller description of which see Part II, Introduction and notes to s. 5.

[4] See s. 198.

[5] As to foreign jurisdiction, see s. 294 and notes thereto.

[6] Hall.

[7] 41 & 42 Vict. c. 73, 1878.

[8] (1877) 2 A.C. 394.

up to the marine league limit (three miles) and in islands coming into existence within this limit belong to the Crown: see *Secretary of State* v. *Chellikani Rama Rao.*[1]

Right over air

A State can also exercise the sovereign rights it possesses over the land itself in the air space above its territories; the British Aerial Navigation Acts[2] confer power on a Secretary of State to exclude foreign aircraft, to make regulations for their entry into the air space above British territory and to prohibit the navigation of aircraft over prescribed areas. Aerial navigation over foreign countries is now governed by the International Convention of 1919 which is based on the principle that every power has complete and exclusive sovereignty over the air space above its territory, but each contracting state undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting parties on their observing conditions laid down in the Convention. For military reasons or in the interest of public safety, flight over certain areas may be prohibited.

A definition of the territorial limits of a State is also important from the point of view of its jurisdiction. A court cannot exercise power beyond its territorial limits, for jurisdiction depends upon physical power and the right to exercise power is exercisable only against persons who are within the territory of the sovereign whom the court represents. In *John Russell & Co. Ltd.* v. *Cayzer, Irvine & Co.*[3] Lord Haldane makes the following observation: 'The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and therefore whosoever is served with the King's writ and can be compelled to submit to the decree made, is a person over whom the courts have jurisdiction.' In *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*[4] Lord Selbourne made the following observation:

> All jurisdiction is properly territorial. . . . Territorial jurisdiction attached (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory and it may be exercised over the movables within the territory; and in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled within the territory.

The Court will not arrogate jurisdiction over a case unless, consistently with the principle of effectiveness, there is a reasonable certainty that it will be able to enforce its judgement. But there are a few conspicuous exceptions to the principle of territorial jurisdiction of a state. A merchant vessel while in non-territorial waters is subject only to the sovereignty of the country to which she belongs, and all acts done on board while on such waters are cognizable primarily by the courts of her state.[5] The state also retains control over its members when beyond its territorial jurisdiction in so far as such control can be exercised with-

[1] (1916) 39 Mad. 617. [2] 1 & 2 Geo. 5, c. 4, 1911 and 2 & 3 Geo. 5, c. 22, 1912.
[3] [1916] 2 A.C. 298 at p. 302. [4] [1894] A.C. 670 at p. 683.
[5] See ss. 686 and 687 of the Merchant Shipping Act, 1894. See notes to s. 110 (b) (i).

out derogating from the territorial right of foreign states. The Act confers powers on the Federal Legislature to legislate for Indian subjects wherever they may be.[1]

'Rights, authority and jurisdiction' in relation to any other territories in India include the exercise of powers of the Crown under the Foreign Jurisdiction Act,[2] which have hitherto been exercised by the Governor-General in Council. The exercise of foreign jurisdiction is now regulated by the Foreign Jurisdiction Act, 1890, which begins by reciting that by treaty, capitulations, grant, usage, sufferance and other lawful means, the Crown has jurisdiction within diverse foreign countries (including the Indian States). The Act empowers persons authorized by warrant from the Crown to send for trial at some specified British court, persons charged with offences in the foreign country. It also authorizes the Crown by Order in Council to create courts of civil and criminal jurisdiction in the foreign country and to regulate the procedure of the courts and to define the persons who should be subject to their jurisdiction.

Prerogative powers

The authority of the Crown which extends over the whole of British India is derived from many sources, in part statutory and in part prerogative. Many of the rights vested in the Crown have hitherto been exercised either under the authority of a statute or by delegation from the Crown, by certain officers and ministers. This section provides for resumption by the Crown of all such delegated rights and their redistribution in such manner as the Act prescribes. This redistribution in accordance with the provisions of the Act restricts to a certain extent the prerogative rights of the Crown; for example, the prerogative to determine the extent of the Governor-General's and Governor's powers under Letters Patent is restricted by those sections of this Act which prescribe the extent of the federal and the provincial executive authority. It is to be noted that where the operation of a statute overlaps the exercise of the prerogative, there the prerogative is superseded to the extent of overlapping.[3] Despite the wide operation of the Act, the Crown can still exercise in respect of India all prerogative powers such as the Crown possesses over overseas territories, save in so far as they are regulated by the Act.

1. The Crown possesses the vital prerogative of the *control of foreign policy*, including the right to cede territory. The Federal Legislature cannot make any law affecting the dominion or suzerainty of the Crown in any part of India by s. 110 (*b*) (i). The Crown may delegate under the Act the exercise of prerogatives regarding external affairs to the Governor-General.[4] For the unfederated States, the delegation will be made to His Majesty's representative.[5] The proclamation of neutrality in the case of war emanates from the Crown, and the rules to be observed in India are those prescribed by His Majesty's Orders. The power to make peace is likewise a prerogative power which includes the right to enforce the terms of treaties. This power also may be delegated to the Governor-General, as was done in the case of various treaties with Afghanistan.

[1] See s. 99 (2). See also the powers of the Legislature under its foreign jurisdiction, s. 294.

[2] 53 & 54 Vict. c. 37, 1890.

[3] *Attorney-General* v. *DeKeyser's Royal Hotel Ltd.*, [1920] A.C. 508.

[4] See s. 3 (1) (*b*). [5] See s. 3 (2).

2. The Crown has the prerogative of the *annexation or cession* of territories.[1] But the annexed territory can only be included in a Province, and such inclusion must take place, in the manner specified in s. 311 (1), i.e. after consultation with the Government and the legislature of the Federation and of the Province concerned. It has been held by the Privy Council that the cession of territory by an Act of the Indian Legislature is invalid.[2]

3. The Crown has many prerogative rights in relation to property such as the right to *escheat*: the right to gold and silver mines[3]; the right to *bona vacantia* or goods over which no one can claim a property, such as the estate of persons dying intestate and without next of heir[4]; *treasure-trove*; the personal property of a dissolved corporation, etc. All the land in British India is vested in the Crown as ultimate owner, and all waste land is its absolute property.[5] S. 174 of the Act provides that any property in India accruing to the Crown by escheat or lapse or as *bona vacantia* shall, if it is property situate in a Province, vest in the Crown for the purpose of the Government of that Province. But the Act does not mention, as in the preceding case, whether the prerogative right over mines or treasure-trove attaches to the Crown for the purpose of the Province (where they are situated), or of the Federation. It is necessary to make this distinction in the character of the prerogative authority, since the unity of the authority of the Crown is broken by the creation of the federal system. It may be assumed, however, on the analogy of the *Hudson Bay* case, that the gold and silver mines and waste lands belong to the Crown, by virtue of its prerogative right for the purposes of the Province, in the territory of which they are situate, and in all other cases to the Federation.

4. The Crown enjoys, apart from statute, *immunity from civil or criminal proceedings* for itself and its property, including its ships. See *Young* v. *S.S. Scotia*,[6] where it was held that the ships of the Crown are exempt from seizure in respect of salvage claims or damage done by collision. Exemption from civil liability has been modified in diverse ways by the Act which makes provision for direct suit against the Federation and Provinces and in certain cases against the Secretary of State.[7]

5. The prerogative right to *grant honours* of all kinds, whether in British India or on Rulers and subjects of the Indian States, and the right to settle the order of precedence whether in British India or as between the Rulers are reserved to the Crown.

6. The Crown enjoys the prerogative of *granting pardon*. It is provided in s. 295 of the Act that no authority outside a Province except the Governor-General shall have any power to suspend, remit or commute a sentence of death passed on any person convicted in the Province. The section further provides that nothing in the Act shall derogate from the right of His Majesty or of the Governor-General, if any such right is delegated to him, to grant pardon, reprieves, respites or remissions of punishment.

1 See s. 110 (*b*) (i).

2 See *Damodar Gordhan* v. *Deoram Kanji*, [1876] 1 A.C. 332.

3 *Hudson's Bay Co.* v. *A.G. for Canada*, [1929] A.C. 285.

4 *Attorney-General of Ontario* v. *Mercar* (1883), 8 A.C. 767; *Collector of Masulipatam* v. *Narainapah* (1860), 8 M.I.A. 500.

5 *In re Transfer of Natural Resources to the Province of Saskatchewan*, [1932] A.C. 28.

6 [1903] A.C. 501.

7 See s. 176 and s. 179.

7. *Paramountcy* is a part of the royal prerogative. The Crown possesses large powers over the Indian States as the Paramount Power in India. Acts done by the Crown, in relation to the Indian States in exercise of powers vested in it as the Paramount Power, are Acts of State which are not cognizable by any court either in India or in Great Britain.[1] The greater part of the field of paramountcy is untouched by the Act. The Act contemplates that certain matters which had hitherto been determined between the States and the Crown will in future be regulated to the extent that States accede to the Federation, by the legislative and executive authority of the Federation. But in other respects (and in all respects as regards non-federating States), paramountcy is essentially untouched by the Act.

According to Professor Holdsworth,[2] the growth of paramountcy has added a new and distinct prerogative to the Crown. The complex of rights and duties covered by the term paramountcy is only a part of the royal prerogative, though a very distinct part. The prerogative, modified and supplanted by statutes and constitutional practice, is the source of many of the important powers of the executive throughout the British Empire. With respect to the Indian States, the Paramount Power does not possess the whole of these rights and powers —the control of the courts, of the police and of the coinage belongs to the States. Professor Holdsworth further maintains that paramountcy is a distinct part of the prerogative. Whereas by the common law and by statute, the prerogative extends over all countries which are governed by the Crown, paramountcy only extends to the Indian States, and the States are only subject to that part of the prerogative which is included in the term 'paramountcy', for State territory is not British territory, nor are the State subjects while residing in their States, British subjects. Another distinctive feature of paramountcy is that it does not depend for its existence on the common law, though in some respects, the mode of exercise has been prescribed by statute. It rests upon treaties, engagements and *sanads*, supplemented by usage and by decisions of the Government of India and of the Secretary of State, embodied in the practice of the Political department.

8. In general, the Crown enjoys, subject to the provisions of the Act, all the privileges it has under the prerogative in England. Thus, it is entitled to the benefit of the rule that no statute is deemed to bind the Crown unless this is specifically mentioned or is essentially implied by the measure.[3]

The rights of the Crown in India may, however, exceed, apart from statute, those of the Crown in England, for the Crown in India succeeded to all the rights of the East India Company and that body had, by virtue of the acquisition of territory from earlier sovereigns, the same rights over the territories as their late sovereigns had.[4]

[1] See *Secretary of State* v. *Kamachee Boye Saheba* (1859), 13 Moo. P.C.C. 22; *Salaman* v. *Secretary of State*, [1906] 1 K.B. 613. See also Part X, Chapter V, note on RULE OF LAW, under ACT OF STATE.

[2] See the *Law Quarterly Review* (1930), Vol. XLVI, p. 407.

[3] *Secretary of State* v. *Bombay Landing & Shipping Co.* (1868) 5 Bom. H.C.R. at p. 27; *Ganpat Putaya* v. *Collector of Kanara* (1876) 1 Bom. 7; *Secretary of State* v. *Mathura Bhai* (1890), 14 Bom. 213; *Bell* v. *Municipal Commissioners of Madras* (1902) 25 Mad. 457.

[4] *Rana Ubhee Singh* v. *Collector of Broach* (1821), 2 Borr. 50; *Salaman* v. *Secretary of State*, [1906] 1 K.B. 613; *Bapooji Rughoonath* v. *Sinwar Kana* (1822) 2 Borr. 376.

The Viceroy

The word 'Viceroy' employed to describe the representative of the King-Emperor in relation to the Indian States was adopted by the Butler Committee and accepted by the Simon Commission.[1] As they point out, the word does not occur in any Act or statutory rule, nor is it used in the Warrant of Appointment of the Governor-General under s. 34 of the old Act. It appears for the first time in Queen Victoria's Proclamation of 1858 when Lord Canning was appointed 'Our first Viceroy and Governor-General', thereby distinguishing him, on the direct assumption by the Crown of the Government of India, from the previous Governor-General under the Company. The Butler Committee[2] recommended that the Viceroy, and not (as under the old Act) the Governor-General, should be the agent of the Paramount Power in its relations with the Princes. But under s. 33 of the old Act, the superintendence, direction and control of the whole of India (including the Indian States) is vested in the Governor-General in Council. The Simon Commission recommended an amendment of the law[3] so that the exercise of paramountcy over the Indian States is vested in the hands of the Viceroy, as distinguished from the Governor-General. In the White Paper,[4] it is stated that on the repeal of the old Act, all powers in connexion with the government of British India will vest in the Crown; and the powers vested in the Crown in relation to the Indian States formerly exercised through the Governor-Gen ral in Council (except those which are requisite for federal purposes and which the Rulers have assented to transfer to the Federation for such purposes) will be exercised by the Viceroy as the Crown's representative. These powers will be outside the scope of the federal constitution. The Viceroy will thus be recognized as holding an office separate from that of the Governor-General. The office of the Governor-General of the Federation will be, under the new Act, constituted by Letters Patent conferring on him powers to be exercised as the King's representative, and such other powers not inconsistent with that Act as may be delegated to him by His Majesty the King-Emperor.

Thus, under the new Act, there is a distinction drawn between the functions of the Governor-General and those of the Viceroy. The Governor-General, for instance, will be in charge of external affairs, which will not, however, include relations with the Indian States in matters in which they have not agreed to federate, such matters being dealt with personally by the Viceroy as representing the Crown in its relation with the States.[5]

The Secretary of State

His Majesty's principal Secretaries of State are now seven in number; but although in practice the powers of the Secretary of State are assigned to seven different persons, there is still in legal form only one office, and any one of the Secretaries may legally exercise its powers. Acts of Parliament still confer powers on a Secretary of State, which by statutory definition means 'one of His Majesty's principal Secretaries of State'. Under the old Act, the Secretary of State appoints, and is assisted by, the Council of India, consisting of fifteen members, of whom nine must have recently served or resided for ten years in India. Unlike the departments of the other Secretaries of State, the expenses of the India Office were charged mainly not upon the revenues of Great Britain,

1 See Vol. II, 229, footnote.
2 Pars. 67 and 106.
3 Vol. II, 229.
4 Intr. 9-10.
5 See W.P. Prop. 3.

but upon those of India, but an annual grant-in-aid of the comparatively trifling sum of £150,000 was made by the Treasury as a contribution to the cost of the department. Parliament paid the salary of the Secretary of State and of the Parliamentary Under-Secretary, but the rest of the vote took the form of a grant-in-aid in respect of the expenditure of the India Office in England. This expenditure was not audited in detail by the Controller and Auditor-General, nor were the unspent balances surrendered, according to the ordinary rule, to the Exchequer.[1]

The Governor-General of India and His Majesty's Representative as regards relations with Indian States

3.—(1) The Governor-General of India is appointed by His Majesty by a Commission under the Royal Sign Manual and has—

(*a*) all such powers and duties as are conferred or imposed on him by or under this Act; and

(*b*) such other powers of His Majesty, not being powers connected with the exercise of the functions of the Crown in its relations with Indian States, as His Majesty may be pleased to assign to him.

(2) His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States is appointed by His Majesty in like manner and has such powers and duties in connection with the exercise of those functions (not being powers or duties conferred or imposed by or under this Act on the Governor-General) as His Majesty may be pleased to assign to him.

(3) It shall be lawful for His Majesty to appoint one person to fill both the said offices.[2]

Inasmuch as the basis of the new Act is a Federation including the Indian States, a distinction has been drawn between the rights, authority and jurisdiction of the Crown in and over British India on the one hand and its rights, authority and jurisdiction elsewhere in India, including rights comprehended under the name of paramountcy on the other. These, under the old Act, were exercised on behalf of the Crown by the Governor-General in Council, under the general supervision of the Secretary of State; and under the new Act they have been resumed in their entirety into the hands of the Crown. They are now to be

[1] See J.C.R. 382–89, and for audit, Sim. C.R. Vol. I, 432, and J.C.R. 396-99. See further Part XI, ss. 264–69, and notes. For the position of the Secretary of State under the old Act see old Act, s. 2 (Secretary of State), ss. 3–10 (Council of India), ss. 17-18 (Establishment of the Secretary of State), s. 21 (control over expenditure), ss. 23–27 (accounts of Secretary of State and audit), ss. 28-29 and 32 (rights of Secretary of State over property and liability). W.P. Intr. 67–69; W.P. Prop. 177–79; J.C.R. 152, 382–89, 396–99. For transitory provisions, see notes under s. 145.

[2] See old Act, s. 34; W.P. Intr. 9 and 10; and W.P. Prop. 6; J.C.R. 158, and 165. For INSTRUMENT OF INSTRUCTIONS, see ss. 13, 14, 53, and notes thereunder. See notes to s. 2(2) above under PARAMOUNTCY and VICEROY.

exercised by the representative of the Crown in his capacity as Viceroy; so the office of the Governor-General has been severed from that of Viceroy.[1]

The office of the Governor-General and the office of Viceroy will, as a matter of course, be combined in the same person even though the two offices may constitutionally be held by two different persons.

The office of the Governor-General is constituted by Letters Patent under the Great Seal, accompanied by Instructions under the Royal Sign Manual and Signet, while the actual appointment is made by commission under the Royal Sign Manual and Signet.

The use of the Seal ensures the responsibility of the Secretary of State for every act of the King. The British Government have no longer any voice in the choice of the Governor-General of a self-governing Dominion, who is appointed by the King exclusively on the advice of the Ministry of the Dominion concerned. The case of India is different. It will continue to be a dependency under the Act and the Indian Ministry cannot claim to have any voice in the selection of the Governor or the Governor-General.[2]

Under s. 87 of the old Act, if the Governor-General or the Governor departed from India, intending to return to Europe, his office thereupon became vacant. By the Government of India (Leave of Absence) Act, 1924,[3] the Secretary of State in Council was empowered to grant leave once for a period up to four months to a Governor-General, and, on the recommendation of the Governor-General in Council, to a Governor. There is in the new Act no provision corresponding to the old s. 87, and the Act has been repealed.[4] Provision regarding leave will now be regulated by Order in Council (under paragraph 2 of the Third Schedule) and paragraph 3 of this Schedule provides for leave allowance to the Governor-General or the Governor.

For transitory provisions see notes under s. 145.

See the Letters Patent[5] dated the 5th March, 1937, constituting the office of the Governor-General of India, under s. 3(1). Power is given to him in His Majesty's name to grant pardon[6] and to grant commissions in His Majesty's Indian Naval Forces, Indian Land Forces, and Indian Air Force.[7]

By Letters Patent[8] dated the 5th March, 1937, the office of the Crown's Representative for the exercise of its functions in its relation with Indian States was constituted. In paragraph 2, it was laid down that the person who is the Governor-General for the time being shall also be the Crown's representative.

Instructions[9] to the Governor-General of India under the Royal Sign Manual and Signet have been issued on the 8th March, 1937.

Commission under the Royal Sign Manual and Signet dated the 8th March, 1937, appointing the Marquess of Linlithgow Governor-General of India and the Crown's representative for the exercise of its functions in its relation with Indian States, has been issued.[10]

1 W.P. Intr. 10. 2 See J.C.R. par. 61 3 14 & 15 Geo. 5, c. 28.

4 See the Sixteenth Schedule.

5 Gazette of India Extraordinary, April 1, 1937, p. 1.

6 S. 295(2). 7 S. 234.

8 Gazette of India Extraordinary, April 1, 1937, p. 426.

9 Ibid., p. 4.

10 Gazette of India Extraordinary, April 1, 1937, p. 3.

The Commander-in-Chief in India

4. There shall be a Commander-in-Chief of His Majesty's Forces in India appointed by Warrant under the Royal Sign Manual.

Under the old Act, the Commander-in-Chief was ordinarily appointed member of the Governor-General's Executive Council by His Majesty. He ranked next after the Governor-General. His salary was Rs.1,00,000 a year. He could be granted leave of absence. Under the new Act, the executive authority of the Federation vested in the Governor-General includes the superintendence, direction and control of the military government of India as under old s. 33, but the command of the Forces in India will be exercised by the Commander-in-Chief to be appointed by His Majesty. His pay, allowances and conditions of service will be regulated by Order in Council.[1]

[1] See s. 232 and notes.

PART II

THE FEDERATION OF INDIA

CHAPTER I

ESTABLISHMENT OF FEDERATION AND ACCESSION OF INDIAN STATES

INTRODUCTION

The Act provides for a federal constitution for India. It creates a new polity called the Federation of India in which both the British Indian Provinces and the Indian States are to be federally united.

The scheme of federation embracing every part of Greater India (i.e. British India and the Indian States) was first foreshadowed in the Montagu-Chelmsford Report[1]:

> Looking ahead to the future, we can picture India to ourselves only as presenting the external semblance of some form of 'federation'. The Provinces will ultimately become self-governing units, held together by the central Government which will deal solely with the matters of common concern to them. But the matters common to the Provinces are also those in which the Native States are interested—defence, railways, tariffs, exchange, opium, salt, and posts and telegraphs. The gradual concentration of the Government of India upon such matters will therefore make it easier for the States, while retaining the autonomy which they cherish in internal matters, to enter into closer association with the central Government if they wish to do so.

The Butler Committee (1929) also visualized constitutional development in the direction of federation:

> We have left the door open to closer union. There is nothing in our proposals to prevent the adoption of some form of federal union as the two Indias of the present draw nearer to one another in the future. There is nothing in our proposals to prevent a big State or group of States from entering now or at any time into closer union with British India.[2]

The Indian Statutory Commission (1930), following what had, in their opinion, become a generally accepted view, expressed in their Report their own belief that the essential unity of Greater India would one day be expressed in some form of federal association. The delegates of British India as also of the Indian States to the three Round Table Conferences held in London (1930–3) unanimously accepted the federal constitution as being most suitable for India.

Federalism

The theory and practice of federation in the modern state is not older than the American federation which came into existence in 1787, although the federal idea of government is ancient, and had actually been followed in Greece. Several federal states have since come into existence—Switzerland in 1837, Canada and Germany in 1867, Australia in 1902, South Africa in 1909, and Germany again in 1919. Regarding the conditions of federalism, Dicey observes as follows:

[1] Par. 300.

[2] Butler Com. R., 78.

> A federal state requires for its formation two conditions. There must exist in the first place, a body of countries such as the cantons of Switzerland, the colonies of America, or the provinces of Canada, so closely connected by locality, by history, by race or the like, as to be capable of bearing in the eyes of their inhabitants an impress of common nationality . . . A second condition absolutely essential to the founding of a federal system is the existence of a very peculiar state of sentiment among the inhabitants which it is proposed to unite. They must desire union and must not desire unity. If there be no desire to unite, there is clearly no basis for federation . . . The phase of sentiment, in short, which forms a necessary condition for the formation of a federal state is that the people of the proposed states who wish to form for many purposes a single nation, should not wish to surrender the individual existence of each man's state or canton.

Herman Finer writes in *Modern Government* :

> In the formation of federations the impulses have been given by spiritual ideals of material unity, by the prospect of the fullest extension of desired rights, by the economic motive, by considerations of defence, international prestige, the peaceful settlement of fears produced by the contiguity of human groups, which tend to form collective dislikes, the amicable resolution of common problems and the energies and aspirations of specified men. On the other hand, racial, cultural, religious and economic differences obstruct the formation of the Great States, while personal desires for prestige, which can be satisfied only in a small and separate polity, add to the separative force.

In a truly federal system, both the centripetal and the centrifugal forces, which struggle constantly for supremacy, have to be balanced, and the constitution, while recognizing the distinct political existence of communities for certain defined purposes, joins them together into a common whole for certain other equally defined purposes. It is a political contrivance intended to reconcile national authority with the preservation of state rights.

Distinctive characteristics

First, the federal constitution must be the result of a deliberate and conscious act of political evolution. A federation is made, not born.[1] Second, the result of this conscious and deliberate act must be embodied in a written document or Instrument. A federal constitution partakes of the nature of a treaty between sovereign states, and so the treaty must be reduced to writing. Third, as it is desirable that the terms of the treaty should only be varied by the deliberate action of the parties thereto, the federal constitution must be rigid. There are degrees of rigidity varying from the very rigid constitutions of the United States, Australia, and Switzerland, the less rigid constitution of Germany, and the still less rigid constitution of Canada embodied in the British North America Act, which may be, theoretically at any rate, amended or repealed like any other statute of the Imperial Parliament. Fourth, there must be some body, presumably judicial in character, entrusted with the authority to safeguard the constitutional Instrument, and competent to interpret its terms. Fifth, there must be a precise distribution of powers; on the one hand between the several organs of the federal

[1] See Marriott, Vol. II, p. 409.

government—the executive, the legislature, and the judiciary; and on the other hand as between the federal government and the government of the component states.

The relations between the Indian States and British India are of such a nature that they satisfy the conditions laid down above. As Lord Halifax, in a speech before the Toronto University, said:

> The whole (i.e. the States and British India) is a curious and unrivalled piece of mosaic, inherited from the past; adjacent tracts distinguished sharply in constitutional position, yet naturally sharing a wide community of ideas and often a complete identity of economic interests. The great functions of government—defence, finance, customs, communications and the like—concern equally the two Indias, British India and the States; and those who plot the future of the one or the other are driven at every turn to acknowledge the ultimate necessity of devising some measure of organic unity between them.

The constituent units of the Federation of India are, under the Act the Federating Provinces of British India and so many of the Indian States or groups of States as may enter into the Federation. The States are free to choose whether or not, they are to enter the Federation. The Act assumes that the States desire some form of association or union, but not unity, with British India, but the Act requires the States to express that desire for association in a formal way by executing a document, called an *Instrument of Accession,* under the provisions of s. 6 of the Act. It has been observed in the White Paper [1] that federation in other countries has usually resulted from a pact, entered into by a number of political units, each possessed of sovereignty or at least autonomy, and each agreeing to surrender to the new central organism, which the pact creates, an identical range of powers and jurisdiction to be exercised by it on their behalf to the same extent for each one of them individually and for the Federation as a whole. Obviously, the question of a pact or agreement cannot arise in the case of the Provinces of British India, as they do not possess any independent or original powers or authority to surrender to the central Government. The Indian States are, however, in a different category. The accession of an Indian State to the Federation cannot take place otherwise than by the voluntary act of its Ruler. The powers of the Federal Government to exercise authority over the States will necessarily be such as are voluntarily surrendered by the States to the Federation. It is true that the Federation of India varies in some features from a truly federal type, but it possesses the essential characteristics common to all federations, namely, the constitution is set out in a written instrument, the constitution is made supreme over Governments and legislatures; power is divided between the centre and the units; and the courts, which are not subordinate to either, are entrusted with the task of interpreting the constitution.

Residuary powers

This directly leads to the consideration of another essential attribute of a federal state. A federation is a form of government wherein for the purpose of the administration of some important governmental functions, the constituent units are recognized as independent and free from control by the central Government and wherein the administration of the matters of common

[1] Cmd. 4268, Intr.

concern is entrusted to the central Government, called the federal Government. This allocation of different functions to local and to central organizations is an essential feature of a federation. This involves a distribution of legislative powers, so that each constituent unit is free to make its own state laws, and the functions of the common government is confined to the making of laws which are excluded from the ambit of the state legislatures.

The manner in which powers are distributed as between the federal and the state governments is indeed vital.[1] In the United States, the states were intensely tenacious of their rights and only agreed to give up to the central authority certain specified functions, all powers not so specified remaining vested in the states. In Australia, the same principle was adopted. By the Commonwealth Act, it is provided that every power of the Parliament of a state, unless exclusively vested by the constitution in the Commonwealth Parliament or withdrawn from the Parliament of the state, is to continue to remain in the state. In Canada, on the other hand, the residuary powers are vested in the Dominion Parliament. By the British North America Act of 1867, sixteen subjects have been exclusively vested in the provincial legislatures, and twenty-nine in the Dominion Parliament, and it is expressly provided that that Parliament has the right to deal with any matter not coming within the classes of subjects assigned by the Act exclusively to the provincial legislatures. Some of the federal subjects enumerated tended dangerously to overlap the subjects exclusively assigned to the provinces. As there was no provision for a concurrent list, the validity of laws had frequently to be tested in the courts.[2]

Immense significance attaches to the allocation of residuary powers. The Canadian type of federal state may be called centripetal (the residuary powers being in the centre). The types of federalism represented by the United States and Australia may be called centrifugal (the residuary powers being in the states). Under the new Indian constitution, a third and an intermediate type has been created, which is of an entirely novel character.[3] The framers of the new Indian constitution adopt a novel method in the allocation of powers. The Act does not confer residuary powers either on the Federal or on the provincial Legislature, but makes provision for three lists, the first exclusively federal, the second exclusively provincial, and the third concurrent; and the power of allocation of the residue is vested in the Governor-General. The lists are so widely drawn that they seem to cover the whole field of legislation, and the residue not covered by the lists would be negligible. Such an attempt to distribute the functions of legislation, among the rival legislatures, is wholly without precedent. As observed by the Joint Select Committee, the method adopted is essentially a compromise between opposing schools of thought in India. The logical conclusion of the White Paper proposals would be to allocate the residuary powers to the provincial Legislature, but then there should be in List I a general overriding power in the central Legislature in matters of All-India concern, since a new subject of legislation cannot be left automatically to fall in the provincial field, irrespective of its national implication. But such an overriding clause has led to litigation in other federal states. As regards the Federated States, the residuary powers in relation to func-

[1] See Marriott, Vol. II, pp. 410 *et seq.*
[2] See Australia Act, Part V, ss. 51 and 107; Canada Act, ss. 91 and 92.
[3] See s. 104.

tions not transferred to the Federation by the Instrument of Accession, remain in the States.

One feature is common in all federal constitutions, namely as between the federal government and the governments of its component parts, there is a division made of the governmental functions and of the authority to deal with them. It is not necessary, however, that the local governments should be immune from central control in respect of functions within their jurisdiction. It is enough if the degree of central control is defined in the constitution itself, so that they are necessarily secured from any unwarranted interference except in so far as it is provided for in the constitution. This distribution of the function of sovereignty or rather this division of the authority to exercise the functions of sovereignty naturally requires the provision of constitutional safeguards against mutual encroachment. . . .

Permanence of the Federation

It is to be noted that, once the Instrument of Accession has been accepted and the State admitted to the Federation of India, it is not open to the State to withdraw from it at all. The union is a permanent one. The Act may only be amended in those provisions mentioned in the Second Schedule without affecting the accession of the States, and further, the amendments must not extend the functions of His Majesty or of the Federation under the Instrument in force. If they are so extended, the amendments will not bind the State unless accepted by a supplementary Instrument. In case of failure of constitutional machinery, when the Governor-General has issued a Proclamation under s. 45, such Proclamation can only last for three years, after which the Government of the Federation must be resumed under the terms of the Act with such amendments as may be made by Parliament (which amendments, if made outside the Second Schedule, or, if made within the Schedule, they extend the functions of His Majesty or of the Federation, will not bind the State unless accepted by a supplementary Instrument). The normal activities of the Federation must be resumed within three years, so that the States who have joined it may continue to enjoy the benefits of the union, as provided in the Act. But in no case can any State secede from the Federation. A number of judicial decisions in the United States has laid down that in the United States, the secession of a State from the federation is not admissible. The constitutional position has thus been stated by Herman Finer in *The Theory and Practice of Modern Government*:

> The union is properly regarded as a national body, the states being within the system and not capable of acting outside. . . . The court is the only judge of the relationship between the parts and the whole of the constitution. . . . The constitution in all its provisions looks to an indestructible union composed of indestructible states. Revocation and secession are impossible—for the Union is perpetual.

Recently in Australia, the Commonwealth Government has rejected the claim of Western Australia to secede, declaring that secession is a constitutional impossibility.

Dualism of law

In a unitary state like England, there is one body of law, that made by Parliament or bodies subordinate to it, to which English citizens owe obedience. Similarly in France. But in a federation, a citizen owes obedience to more than one system of law, made by different authorities. For instance, in the United States, a citizen is governed by four competing kinds of law:

the federal constitution, the ordinary federal law, the law of the state constitution, and the state law.

As Marriott remarks,[1] a reduplication of organs, legislative, administrative, and judicial, is one of the indispensable marks of true federalism. In the United States, there is a complete system of federal judicature existing throughout the Union side by side with, and quite independent of, the state courts, and no appeal can lie from the state to the federal court, except in cases involving federal law, and in cases where one of the parties to the suit belongs to a different state. In Canada, on the other hand, there is only one set of courts and one staff of judges; this is one of the several marks of the predominantly unitary basis of the Canadian constitution. In India, the Federal Court has no independent machinery of its own for giving effect to its orders and decrees. This work is entrusted to the provincial and the state High Courts. The Australian constitution stands midway between those of the United States and Canada. The High Court of Australia is the supreme federal court; state courts in Australia, unlike the American state courts, are invested with federal jurisdiction, and an appeal lies from the state courts to the High Court of Australia. In British India, the citizen is governed by (1) the laws of the imperial Parliament applicable to India; (2) the federal and the provincial constitution as in the new Act; (3) federal laws; and (4) provincial laws.[2]

In a Federated State, the citizen is governed by (1) the laws of the imperial Parliament applicable to the States; (2) paramountcy; (3) the constitution and the laws of the Federated State; (4) the federal constitution so far as applicable under the Instrument of Accession, and (5) the federal laws made in matters in respect of which the Federal Legislature has power to make laws. For the execution and administration of these laws, the agency of the provincial Governments may be employed, as also the agency of the state Governments.[3]

In the Indian constitution, the Act provides against the danger of mutual encroachment by creating a *Federal Court*, and by investing the Governor-General with special powers to intervene whenever the federal or the state Governments exceed their respective legislative jurisdiction.[4]

The Indian States

The Act presupposes the concurrence of a sufficient number of the Indian States to a federal union to be established under its provisions. From the constitutional point of view, the Indian States (known until recently as the Native States) lie entirely outside British India. They possess certain attributes of sovereignty, but they are all under the suzerainty of the British Crown as the Paramount Power. They conduct every department of internal administration in their own name without much interference by the British Crown, except in case of gross misgovernment. Supreme executive, judicial and legislative authority is vested in their Rulers, and they are not subject to the jurisdiction of the British courts, civil or criminal.[5]

[1] Vol. II, pp. 415-6.

[2] See Part IX, Chapter I, Introduction, under CONSTITUTION OF THE UNITED STATES.

[3] See Part VI.

[4] See Introduction at the head of Part IX, Chapter I.

[5] *Emp.* v. *Keshab* (1892) 8 Cal. 985. *Re Bichitrananda* v. *Bhagabat Perin* (1899) 16 Cal. 667.

Classification of States

The States can be classified as follows on the basis of their representation in the Chamber of Princes [1]:

(i) 109 States, the Rulers of which are entitled to a dynastic salute of more than eleven guns and, as such, entitled to be members of the Chamber of Princes in their own right, whose accession will make the Federation possible.

(ii) 127 States, the Rulers of which are represented in groups in the Chamber by twelve members of their order elected by themselves.

(iii) 327 petty estates and jagirs and others who have no such representation.

The internal administration of the different States varies considerably. Some of them (about thirty) have instituted Legislative Councils and High Courts, while some claim to have separated executive and judicial functions. There is, however, a wide difference in the degree of administrative efficiency of the States, which are 'in all stages of development, patriarchal, feudal or more advanced, while in a few States are found the beginnings of representative institutions '.[2] The one common feature, however, is the personal rule of the Prince, and his control over legislation and administration of justice.

All the six hundred States are alike in that ' they are not part, or governed by the law, of British India '. The smaller territories must, therefore, be fitted into the federal scheme, though it is neither possible nor expedient for most of them to support a government with full or nearly full powers. At present they are mostly administered in groups on behalf of their Rulers by British political agents, but this system would be inconsistent with the federal principle. An alternative plan is that they should relate themselves with the neighbouring full-powered States, while continuing their rights and privileges and being assured of due representation in the Government of Federal India.

Paramountcy

The Paramount Power, according to the Butler Committee Report,[3] means the Crown acting through the Secretary of State for India and the Governor-General in Council who are responsible to the Parliament of Great Britain. Paramountcy is based upon treaties, engagements and *sanads*, supplemented by usage and sufferance and by the decisions of the Government of India and the Secretary of State embodied in political practice.

> Usage also has shaped and developed the relationship between the Paramount Power and the States from the earliest times, almost in some cases from the dates of the treaties themselves . . . . Usage and sufferance have operated in two main directions. In several cases where no treaty, engagement or *sanad* exists, usage and sufferance have supplied its place in favour of the States. In all cases, usage and sufferance have operated to determine questions on which the treaties, engagements and *sanads* are silent. They have been a constant factor in the interpretation of those treaties, engagements and *sanads*.[4]

1 This classification was adopted by the Butler Committee.

2 See M.C.R. 300.

3 Par. 18.

4 Butler Com. R., 40.

The decision of the Government of India and of the Secretary of State and the practice of the Political department have conferred rights on the Paramount Power. In *Hemchand Devchand* v. *Azam Sakarlal*[1] it was held by the Privy Council that the declarations of the Court of Directors of the East India Company and of the Secretary of State are authoritative. The enforcement of the treaties and the interpretation of the various provisions have hitherto been among the normal functions of the Government of India, subject to an appellate or supervisory jurisdiction of the Secretary of State for India. By usage or convention, or as a necessary corollary to the paramountcy of the British Power, the Government of India, as agent of the Paramount Power, have claimed and exercised the right of (*a*) interpreting the treaties; (*b*) installing the Princes on the *gadi*; (*c*) administering the States during the minority of the Rulers; (*d*) settling disputes between the Rulers and the Jagirdars; and (*e*) interfering in cases of gross misrule and even deposing the Rulers.

The Indian States thus stand in peculiar relationship to the British Crown as Paramount Power in India. They are *sui generis*; there is no parallel to their position in history, and they are governed by a body of conventions and usage unlike anything else in the world. They fall outside both international and ordinary municipal law.[2] In the opinion of eminent counsel placed before the Butler Committee by the Rt. Hon. Sir Leslie Scott, K.C., M.P., on behalf of the standing committee of the Chamber of Princes,[3] it was stated that the relationship of the Paramount Power with the States was entirely contractual. This view did not find favour with the Butler Committee, who said[4]:

> The relationship of the Paramount Power with the States is not a merely contractual relationship resting on the treaties made more than a century ago. It is a living, growing relationship, shaped by circumstances and policy, resting, as Professor Westlake has said, on a mixture of history, theory and modern fact.

The Butler Committee failed to find some formula which would cover the exercise of paramountcy, the reason being that conditions alter rapidly. 'Imperial necessity and new conditions may at any time raise unexpected situations. Paramountcy must remain paramount; it must fulfil its obligation, defining or adapting itself according to the shifting necessities of the time and the progressive development of the States.'[5] In other words, the relation between the Paramount Power and the States is not fixed, rigid or static, but adaptable, mobile or dynamic in character. Lord Reading summed up the well-ascertained results of a long historical development. He made the following observations in a letter dated 27 March 1926 to H.E.H. the Nizam of Hyderabad[6]:

> The sovereignty of the British Crown is supreme in India and therefore no Ruler of an Indian State can justifiably claim to negotiate with the British Government on an equal footing. Its supremacy is not based on treaties and engagements, but exists independently of them, and quite apart from its prerogative in matters relating to foreign powers and policies, it is the right and duty of the British Government, while scrupulously respecting all treaties and engage-

[1] [1906] A.C. 212, at p. 237.
[2] Butler Com. R., 43.
[3] See Report, Appendix III.
[4] See Report, par. 39.
[5] Butler Com. R., 57.
[6] For the whole of the letter, see Appendix II of the Butler Com. R.

ments with the Indian States, to preserve peace and good order throughout India... The right of the British Government to intervene in the internal affairs of the Indian States is another instance of the consequences necessarily involved in the supremacy of the Crown. The British Government have indeed shown again and again that they have no desire to exercise this right without grave reason. But the internal, no less than external, security which the ruling Princes enjoy is due ultimately to the protecting power of the British Government, and where imperial interests are concerned, or the general welfare of the people of a State is seriously and grievously affected by the action of its government, it is with the Paramount Power that the ultimate responsibility of taking remedial action, if necessary, must lie. The varying degrees of internal sovereignty which the Rulers enjoy are all subject to the due exercise by the Paramount Power of this responsibility... It is the right and the privilege of the Paramount Power to decide all disputes that may arise between the States or between one of the States and itself.

The privileges conferred by the treaties must be construed as subject to this paramountcy. No doubt, in any particular case, effect would be given to the various provisions of the treaty which can extend or restrict the rights which the Paramount Power possesses in respect of that particular State. But treaties can in no wise exempt the States from subordination to the Paramount Power. The Crown has acquired a right by usage, independently of the treaties, to take what measures it sees fit, for the safety of the British Empire, the interests of India as a whole or the interests of the States. This was the view which commended itself to Hall, who says of the Indian States that

their relations to the British Empire are in all cases more or less defined by treaty; but in matters not provided for by treaty, a 'residuary jurisdiction' on the part of the Imperial Government is considered to exist and the treaties are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved or even when the interests of the subjects of the native Princes are involved. The treaties really amount to little more than statements of limitations which the Imperial Government except in very exceptional circumstances, places on its action.[1]

One of the striking consequences of the relationship between the Paramount Power and the Indian States is that sovereignty is divided between them in different proportion. It is recognized in the preamble to s. 47 of this Act, that the Ruler of an Indian State may possess sovereignty over his territories. In his minute on Kathiwad[2] Sir Henry Maine said:

Sovereignty is a term which in international law indicates a well-ascertained assemblage of separate powers or privileges. The rights which form part of the aggregate are specially named by publicists who distinguish them as the right to administer civil and criminal justice, the right to legislate and so forth. A sovereign who possesses the whole of this aggregate of rights is called an independent sovereign; but there is not, nor has there ever been, anything

[1] Hall's *International Law*, 6th ed., p. 27.

[2] Sir Henry S. Maine's Minutes 36-7, cited in Butler Com. R., 44.

in international law to prevent some of these rights being lodged with one possessor and some with another. Sovereignty has always been regarded as divisible... It may perhaps be worth observing that according to the more precise language of modern publicists, sovereignty is divisible but independence is not. Although the expression 'partial independence' may be popularly used, it is technically incorrect. Accordingly there may be found in India every shade and variety of sovereignty, but there is only one independent sovereign—the British Government.

The Princes are thus, to a certain extent, sovereign within their own territories. Then the question arises: Have the States any international status? The legal aspects of the relationship between the Princes and the Paramount Power owe something to rules and concepts of international law and were actually characterized by Sir Henry Maine as 'quasi-international'. 'To international law a state is sovereign which demeans itself as independent; a state is semi-sovereign to the extent of the foreign relations which the degree of its practical independence allows it; and is non-existent if no foreign relations are allowed it.'[1] The tie which unites the British Government and the Princes is not strictly international. Sir William Lee-Warner says in *The Native States of India*[2] that Princes 'find some shelter under the shadow of international law', which means that the principles of natural justice which underlie international law have been applied to their relations, so far as they are similar to the relations, dealt with in international law. In the interpretation of the treaties, engagements and *sanads*, the principles that have been followed were, in the opinion of Sir Henry Maine, rather 'the principles of the law of nations than English municipal law'. In particular, the principle of international law that treaties are not void for duress has been applied to all treaties between the Paramount Power and the States. Just as dealings between two sovereign states are acts of state which are beyond the sphere of municipal law, and are outside the jurisdiction of municipal courts, so acts done by the Paramount Power in the exercise of authority are acts of state which are not cognizable by any municipal court either in India or in Great Britain.[3] Likewise, 'the principles of comity which exempt a foreign sovereign from the process of the courts and which leads the courts of one state to execute the civil process of another state have been applied in the dealings between the Paramount Power and the States'.[4]

Occasions have arisen when it has been found necessary to arraign a ruling Chief for crimes before specially constituted tribunals or to depose him for persistent misconduct or disloyalty. It has been held by the Privy Council that such commissions appointed by the Government of India which convict the Princes are not in any sense courts from which an appeal would lie.[5] Although the division of sovereignty between the

[1] Westlake, 'The Indian States of India' in the *Law Quarterly Review*, Vol. XXVI at p. 315.

[2] Par. 398.

[3] *Secretary of State* v. *Kamachee Boye Saheba* (1889), 13 Moo. P.C. 22. *Salaman* v. *Secretary of State for India* [1906] 1 K.B. 613.

[4] Professor R. L. Holdsworth, 'The Indian States of India' in the *Law Quarterly Review*, Vol. XLVI. p. 421. See Note to Part X, Chapter I, ACT OF STATE

[5] *Maharaja Madhava Singh* v. *Secretary of State* (1904), 31 I.A. 239. See also *Muhammad* v. *Queen-Empress* (1897) 24 I.A. 137.

Indian States and the Paramount Power gives to their mutual relations a 'quasi-international' character, the States do not retain an amount of independent sovereignty which brings them within the definition of 'persons' in international law. As Sir Frederick Pollock observes:

> The relations of the Government of India and the Native States are governed by a body of convention and usage not quite like anything else in the world but such that in cases of doubtful interpretation the analogy of international law may often be found useful and persuasive. For the purposes of international law proper, Mewar and the Nizam's Dominions have just as much existence as New South Wales or Ohio, i.e. none whatever.

This was the view taken by the Government of India in the proceedings arising out of the Manipur case. 'The principles of international law have no bearing upon the relations between the Government of India, as representing the Queen-Empress on the one hand and the Native States under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter.'[1] It follows that the relationship between the States and the British Crown is not international but is derived from the constitutional law of the British Empire,[2] and according to Professor Holdsworth (who was a member of the Indian States Committee) form that part of constitutional law which is concerned with the prerogative of the Crown. The prerogative is the source of many of the important powers of the British Government, and the States are subject to that part of the prerogative which is included in the term 'paramountcy'.

Internal and external sovereignty

The Rulers of Indian States have to a large extent power over their States and subjects, and may be said to enjoy qualified internal sovereignty. But they have no right to enter into relations with foreign powers. The subsidiary treaties uniformly contain a clause by which the States are not to enter into negotiations with foreign powers; and they cannot receive diplomatic or consular representatives from other powers. Even the employment of non-British Europeans without the express sanction of the Government of India is prohibited. The State subjects outside India are regarded as British citizens and entitled to the same protection. By 39 & 40 Vict., c. 46 (1876) it was declared in the preamble that

> 'the several Princes and States in India in alliance with Her Majesty have no connexions, engagements or communications with foreign powers and the subjects of such Princes and States are when residing or being in places hereinafter referred to entitled to the protection of the British Government and receive such protection equally with the subjects of Her Majesty'.

There is a further obligation on the part of the Government of India to see that international agreements entered into with foreign powers are honoured in the States. In foreign relations, the British Government represents the Indian States also, so the obligations thus undertaken are binding on the Rulers of the States and may be enforced by the Government even within the jurisdiction of these States: e.g. extradition of criminals, international agreements on the opium traffic, or the white slave traffic. As the States have no independent status in international law, their maritime boundaries—(in the case of Travancore, Baroda

[1] Butler Com. R., 26.

[2] See Westlake's view quoted in Butler Com. R., 43.

and other States having a coast-line and the land frontiers in the case of Kashmir)—are to be regarded as British frontiers, and in the case of maritime boundaries, admiralty and maritime rights are vested in the Paramount Power.[1]

Not only are States prohibited from negotiating with foreign powers, they are also prohibited from directly negotiating between themselves. This is expressly provided in many treaties. But during the present century, circumstances have combined to lead to greater intercommunication between the States. But they cannot cede, sell, exchange or part with their territories without the approval of the Paramount Power, nor without that approval can they settle inter-state disputes.[2] Sir Henry Maine said in 1863: 'As we do not allow the States to go to war with one another, we claim the right as a consequence, and undertake the duty, of preventing those quarrels and grievances which among really independent powers would lead to international conflict.' This principle still holds good according to the Butler Committee. Thus it may be stated that while the States have to some extent internal sovereignty, they have no external sovereignty.

Paramountcy under the Act

The next point to consider is how far the question of the paramountcy of the British Crown in its relations to the States is affected by the Act, in respect of those Rulers who accede to the Federation of India. The Federal Government under the Act is not a successor to the Government of India, as constituted before the new Act, and the powers hitherto exercised by the Government of India do not devolve on the Federal Government, except in so far as is provided in the Act. One of the normal functions of the Indian Government was to act as the agent of the Paramount Power in its relations with the States; but the Federal Government will only exercise such powers over the States as are surrendered by the States to the Federation under the provisions of s. 6 of the Act. Questions of paramountcy as between the Crown and the States do not come within the scope of the Federation at all, and so the Act does not deal in any way with this matter. If a State accedes to the Federation in certain matters, paramountcy will not be applicable to that State in those matters. In other respects, whether a State federates or not, paramountcy will affect its relationship to the Crown.

Relation between Paramount Power and the States

The general principles which regulate the relations between the Paramount Power and the Indian States may be summarized as follows:

(i) The States have no international life. The external affairs of the States are absolutely controlled by the Crown, which has the power to include the States in treaties affecting India. A declaration of war by the Crown automatically involves the States, and likewise a declaration of peace or neutrality. In foreign countries, the British Government is bound to protect the State subjects, and similarly it is also to protect the foreign nationals in the State territories.

(ii) The Crown exercises exclusive jurisdiction in every State over a European British subject to be tried by the British courts in the State or by a British court outside the State. The Crown may claim similar jurisdiction over a European foreigner, and also over British Indian subjects (though it is not customary to do so), but it can be asserted as to servants of the Crown.

[1] K. M. Panikkar, *Indian States*, pp. 94–6.

[2] Butler Com. R., 47

(iii) The Crown exercises complete jurisdiction over all kinds of persons in certain territories :

(*a*) Berar—permanently leased to the Crown.

(*b*) The Residencies, which by custom exercise complete jurisdiction over an area wider than the Residency itself, and a few civil stations such as Rajkot.

(*c*) The cantonments which, on the principles of international law, would be exempt from local jurisdiction.[1]

(*d*) Railway lands. But cession of lands for defined purposes does not carry with it a transfer of general (e.g. for the proper working and maintenance of the railway lines) jurisdiction for all purposes.[2]

(iv) In some States the jurisdiction is shared with the Crown. In the Kathiawar States, the powers of the Chiefs are defined, but a judicial assistant to the political agent is vested with wide civil and criminal jurisdiction. No appeal lies to the Privy Council from such jurisdiction.[3] Similarly, there is a division of jurisdiction in some Orissa States and in others; although jurisdiction can be exercised, it is necessary to obtain sanction from the political agent, for a capital sentence or life imprisonment, as in the case of the Chiefs of central India and the Simla hill tracts.

(v) For temporary purposes, as in the case of disturbances in a State or during the minority of a Ruler, entire jurisdiction may be taken over by the Paramount Power, to be restored again. These powers were originally exercised under the royal prerogative which authorized the Crown to acquire jurisdiction and to exercise it through such officers as it thinks fit. These powers which still exist are regulated by the Indian (Foreign Jurisdiction) Order in Council, 1902 (under the Foreign Jurisdiction Act, 1890), amended by Order in Council, 1937.

(vi) The Crown can interfere with the internal administration of the States. It exercises control over succession, interposes its authority during minorities of the Rulers and deposes them for misgovernment. But it is also bound to render aid and protect a Ruler from internal rebellion or insurrection.

(vii) The Crown accepts full responsibility for the protection of the States against external or internal aggression, and His Majesty's forces may be utilized by the Viceroy for the purpose.[4] The States are likewise required to afford all necessary facilities in regard to the Indian army. A Ruler is bound to render facilities for the maintenance of British Indian troops in his State. He is bound to satisfy the demands from time to time by the Crown to facilitate railway development, and telegraph construction by cession of land and to aid in the construction of military roads.

(viii) The decision regarding the precedence and salutes due to the States and all matters of ceremonial rests with the Crown.

(ix) Extradition between the Indian States and British India is regulated by treaty and the Indian Extradition Act, 1903. The States are bound to surrender fugitive criminals from British India. When the States seek extradition of an offender from British India, it may

[1] See *Re Hayes* (1888) 12 Mad. 39.

[2] See *Muhammad Yasuf-ud-din* v. *Queen* (1897) 24 Ind. App. 137.

[3] *Hemchand Devchand* v. *Azam Sakarlal*, [1906] A.C. 212.

[4] See s. 286.

proceed under its treaty or ask the political agent to issue a warrant which will be executed by a magistrate in British India subject to the right of appeal to the local Government or to apply to the local Government for surrender. British subjects are not surrendered if the political agent certifies that the case is suitable for trial in British India; offences committed by British subjects and servants of the Crown in the States may be tried under the law of British India.[1] In British India, the position of the Rulers is governed by s. 86 of the Code of Civil Procedure, 1905. The Indian Penal Code, however, does not provide for immunity for crimes committed by them: see *Gaekwar of Baroda State Railway* v. *Habib Ullah*.[2]

As to the authority of the Crown under the Foreign Jurisdiction Act, 1890, see s. 294 and notes thereunder.

Advantages of Federated States

With regard to the position of the Federated States under the Act, the following points may be noted:

(i) Their internal sovereignty is fully guaranteed.

(ii) The jurisdiction of the federal authorities over them is limited under the Instrument of Accession to the extent of the powers transferred.

(iii) Under the Instrument, the special rights and privileges of any particular State may be preserved, if so desired. A maritime State may reserve functions relating to shipping and ports. States may retain legislative control over post office, opium, excise, currency and coinage.

(iv) The right to legislate in non-federal spheres is fully secured and, as regards the subjects transferred to the Federation, the States retain the power of concurrent legislation, subject to the supremacy of the federal law in case of conflict.

(v) The States will nominate their representatives to the Federal Legislature. They have been granted larger representation in both the Houses than what they would have been entitled to on the basis of population. Their population is less than one-fourth of the total, but they have been given one-third of the seats in the Upper, and two-fifths of the seats in the Lower, House.

(vi) For a period of ten years from the inauguration of the Federation, the States will be exempt from direct taxation by the federal authorities. After that period, these States will only be liable for corporation tax, which may at their option be commuted for a periodical lump sum payment.

(vii) The administration of the federal laws in the State is to be entrusted to that State who will employ their agency for the purpose.

(viii) In granting leave to appeal against a decision of the State High Court (under s. 207), the Federal Court will issue a Letter of Request to the Ruler for stating or re-stating a special case by that High Court to the Federal Court. The execution of a decree of the Federal Court in an appeal from a State would be left to the State High Court and the executive powers of the State.

(ix) The Act imposes special responsibility on the Governor-General and the Governor for the protection of the rights of the State and the dignity of its Ruler.

[1] See s. 4 of the *Indian Penal Code* and s. 188 of the *Indian Code of Criminal Procedure*.

[2] (1933) 56 All. 828.

(x) The obligation assumed by the Crown for the protection of the State from internal and external aggression is fully assured by the exclusion of the department of Defence from the ministerial sphere, the Governor-General dealing with the matter in his discretion.

(xi) The rights of paramountcy vested in the Crown which were hitherto exercised by the Governor-General in Council will be exercised by the Governor-General in his discretion, in so far as they come within the Instrument of Accession; the rights outside the Instrument will be exercised by His Majesty's representative.

The Federated States will be in a distinctly better position under the new constitution in the following respects: (1) the State representatives in the Federal Legislature are allowed a voice in purely British Indian matters, while the British Indian representatives have no corresponding rights in State matters; (2) disputes between Federated States among themselves and disputes between a State and the Federation or a Province on a matter involving legal rights, which were hitherto decided by the Governor-General in Council, will now be judicially decided by the Federal Court, and an appeal may lie to the Privy Council—a very valuable right; (3) financially the States will be better off. Tribute paid by many States will be gradually remitted. Compensation for cession of State territories will be paid by the Federation; (4) the States will now have a voice in the determination of tariff, a matter which has hitherto been exclusively dealt with by the central legislature; (5) the Ruler or a subject of a Federated State is eligible to hold any civil office under the Crown in India in connexion with the affairs of the Federation, and the Ruler or subject of a specified unfederated State may be so declared eligible by the Governor-General; and (6) a Federated State may get the services of the High Commissioner for India for their purposes.

Indeed, the Act offers many advantages to States who join the Federation.

5.—(1) It shall be lawful for His Majesty, if an address in that behalf has been presented to him by each House of Parliament and if the condition hereinafter mentioned is satisfied, to declare by Proclamation that as from the day therein appointed there shall be united in a Federation under the Crown, by the name of the Federation of India,— Proclamation of Federation of India

(a) the Provinces hereinafter called Governors' Provinces; and

(b) the Indian States which have acceded or may thereafter accede to the Federation;

and in the Federation so established there shall be included the Provinces hereinafter called Chief Commissioners' Provinces.

(2) The condition referred to is that States—

(a) the Rulers whereof will, in accordance with the provisions contained in Part II of the First Schedule to this Act, be entitled to choose not less than fifty-two members of the Council of State; and

(b) the aggregate population whereof, as ascertained in accordance with the said provisions, amounts to at least one-half of the total population of the States as so ascertained,

have acceded to the Federation.

This section prescribes the date and the conditions of the inauguration of the Indian Federation.[1] The Act does not by itself bring the Federation into being. Under s. 449(1), Part II of the Act is to come into force on such date as His Majesty may appoint by Proclamation establishing the Federation, and such date is referred to in this Act as the date of establishment of the Federation. The States constitute one class of units (the Provinces being the other class), and the establishment of the Federation of India is contingent on the accession of a sufficient number of the States to the Federation. The constitution will be brought into operation if the Rulers of the States representing not less than half the aggregate population of the Indian States and entitled to not less than half the seats allotted to the Federal Upper Chamber, called the Council of State, shall have acceded to the Federation in accordance with the provisions of the next section. For the number of representatives allotted to the States to the Federal Legislature, see Part II of the First Schedule. This condition ensures that the Federation, if it comes into existence, will claim allegiance not merely from at least half the population of the Indian States but also from a large number of the States themselves.

The Federation of India can only be established by royal Proclamation after the condition just referred to has been satisfied, and after an address has been presented to the Crown by both Houses of Parliament with a prayer for its promulgation. The object of providing for an address from both Houses is to enable Parliament to be satisfied not only that the prescribed number of States have in fact signified their desire to accede but also that the financial, economic and political conditions requisite for the establishment of the Federation upon a sound and stable basis have been fulfilled.[2]

Cl. (2) According to the census figures of 1931, the total population of the States is about 80 millions and the number of seats allotted to the Upper House is 104. Therefore States whose aggregate population is 40 millions and which are entitled to 52 seats in the Council of State must execute the Instruments of Accession to the satisfaction of the Crown, before the Proclamation establishing the Federation can be issued.

The inauguration of the Federation is not to await the accession of all the States. The minimum numbers of States must agree and the others may join later on, but within the period stipulated in s. 6(7). A similar method was adopted when the Canadian Federation was constituted. The British North America Act, 1867, which established the Canadian Federation, brought together, in the first instance, only four provinces; the others came in later, and the Act prescribed the procedure to be followed for the admission of other provinces into the Federation

[1] See W.P. Intr. 7-8, W.P. Prop. 2-3; J.C.R. 157.
[2] See J.C.R. 273.

Accession of Indian States

6.—(1) A State shall be deemed to have acceded to the Federation if His Majesty has signified his acceptance of an Instrument of Accession executed by the Ruler thereof, whereby the Ruler for himself, his heirs and successors—

(*a*) declares that he accedes to the Federation as established under this Act, with the intent that His Majesty the King, the Governor-General of India, the Federal Legislature, the Federal Court and any other Federal authority established for the purposes of the Federation shall, by virtue of his Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Federation, exercise in relation to his State such functions as may be vested in them by or under this Act; and

(*b*) assumes the obligation of ensuring that due effect is given within his State to the provisions of this Act so far as they are applicable therein by virtue of his Instrument of Accession:

Provided that an Instrument of Accession may be executed conditionally on the establishment of the Federation on or before a specified date, and in that case the State shall not be deemed to have acceded to the Federation if the Federation is not established until after that date.

(2) An Instrument of Accession shall specify the matters which the Ruler accepts as matters with respect to which the Federal Legislature may make laws for his State, and the limitations, if any, to which the power of the Federal Legislature to make laws for his State, and the exercise of the executive authority of the Federation in his State, are respectively to be subject.

(3) A Ruler may, by a supplementary Instrument executed by him and accepted by His Majesty, vary the Instrument of Accession of his State by extending the functions which by virtue of that Instrument are exercisable by His Majesty or any Federal Authority in relation to his State.

(4) Nothing in this section shall be construed as requiring His Majesty to accept any Instrument of Accession or supplementary Instrument unless he considers it proper so to do, or as empowering His Majesty to accept any such

Instrument if it appears to him that the terms thereof are inconsistent with the scheme of Federation embodied in this Act:

Provided that after the establishment of the Federation, if any Instrument has in fact been accepted by His Majesty, the validity of that Instrument or of any of its provisions shall not be called in question and the provisions of this Act shall, in relation to the State, have effect subject to the provisions of the Instrument.

(5) It shall be a term of every Instrument of Accession that the provisions of this Act mentioned in the Second Schedule thereto may, without affecting the accession of the State, be amended by or by authority of Parliament, but no such amendment shall, unless it is accepted by the Ruler in a supplementary Instrument, be construed as extending the functions which by virtue of the Instrument are exercisable by His Majesty or any Federal authority in relation to the State.

(6) An Instrument of Accession or supplementary Instrument shall not be valid unless it is executed by the Ruler himself, but, subject as aforesaid, references in this Act to the Ruler of a State include references to any persons for the time being exercising the powers of the Ruler of the State, whether by reason of the Ruler's minority or for any other reason.

(7) After the establishment of the Federation the request of a Ruler that his State may be admitted to the Federation shall be transmitted to His Majesty through the Governor-General, and after the expiration of twenty years from the establishment of the Federation the Governor General shall not transmit to His Majesty any such request until there has been presented to him by each Chamber of the Federal Legislature, for submission to His Majesty, an address praying that His Majesty may be pleased to admit the State into the Federation.

(8) In this Act a State which has acceded to the Federation is referred to as a Federated State, and the Instrument by virtue of which a State has so acceded, construed together with any supplementary Instrument executed under this section, is referred to as the Instrument of Accession of that State.

(9) As soon as may be after any Instrument of Accession or supplementary Instrument has been accepted by His Majesty under this section, copies of the Instrument and of His Majesty's acceptance thereof shall be laid

before Parliament, and all courts shall take judicial notice of every such Instrument and Acceptance.[1]

Ordinarily when states or communities desire to federate, they determine by mutual negotiation the form of the federal constitution desired, and they themselves bring the federation into existence. But the circumstances in India are different. A British Indian Province is not independent or autonomous, and cannot negotiate independently with the other British Indian Provinces or with the Indian States. Nor can all the different components of the Federation be bound by an Act of Parliament, which will not have force over Indian States. So this Act provides for the machinery whereby the Indian States may individually accept the constitution and become part of the Federation. The accession of the State thus results from the voluntary act of its Ruler. This Act while providing the framework of a federal constitution for the whole of India does not bring the Federation into existence at once. This can only be done under the provisions of ss. 5 and 6 of this Act. The method whereby such States as are willing to come into the Federation may formally do so is laid down in this section. The Act of Parliament makes the new constitution binding on the British Indian Provinces. The Instrument of Accession makes the new constitution binding on such Indian States as agree to join the Federation, where the conditions of s. 5 are fulfilled. But it is open to the Ruler by his Instrument of Accession to exclude the power of the Federal Legislature to make laws for his State in respect of some of the items in the Federal Legislative List (List I, Seventh Schedule) and to attach conditions and limitations to his acceptance of the others. By s. 8, the executive authority of the Federation is co-extensive with the powers of the Federal Legislature. So it is provided in subsection (2) of this section that a Ruler can to the same extent exclude the executive authority of the Federation in his State or qualify it by corresponding conditions or limitations. Under ss. 130–2, complaint about interference with water supply (which is really a provincial subject) is a federal matter which will attract the jurisdiction of the executive authority of the Federation unless excluded by the Ruler in the Instrument of Accession under s. 134 of the Act.

Instrument of Accession

When this is executed by the Ruler of a State, his powers and jurisdiction in respect of those matters which he has agreed to recognize as federal subjects will be exercised by the federal authorities, i.e. the Governor-General, the Federal Legislature and the Federal Court, strictly within the limits defined in the Instrument. Beyond these limits and outside the federal sphere, the autonomy of the State will not be touched by this Act, and the State's relations will be exclusively with the Crown, and the right to tender advice to the Crown in this regard will lie with His Majesty's Government.[2] Though the list of federal subjects accepted by the Rulers of States may not be identical in every case, yet it is desirable that the Instrument should in all cases be in the same form, so as to avoid difficulty of interpretation by the Federal Court. Then it is

[1] See Introduction to this Chapter under INDIAN STATES, PARAMOUNTCY, PARAMOUNTCY UNDER THE ACT, and notes to s. 5 under INSTRUMENT OF ACCESSION. See also W.P. Intr. 7-8; W.P. Prop. 2-3; J.C.R. 153–7.

[2] See J.C.R. 158.

desirable that there should be a standard list of Federal Subjects for acceptance by the States, and any Ruler who desires to except or to reserve any subjects appearing in this standard list should make out a good case for such exception or reservation before his accession can be accepted by the Crown. There is no obligation on the part of the Crown to accept an accession where the exceptions or reservations sought to be made by the Ruler are such as to make the accession illusory or merely colourable.[1] The provisions of ss. 147 and 149 must be accepted by the Ruler in the Instrument.

With regard to the Federated States, the federal jurisdiction will extend to them only in respect of those matters which the Ruler of the State has agreed in his Instrument to accept as federal.

The Instrument of Accession will have no binding force until His Majesty has signified his acceptance of it and until the Federation has been actually inaugurated in accordance with the provisions of s. 5. The Crown by accepting the Instrument recognizes certain specified matters as federal, and to that extent assents to a modification of its former relations as Paramount Power or under any treaty, with that particular State. In respect of all relations concerning non-federating States and in respect of relations outside the Instrument of Accession concerning Federated States, paramountcy will not be affected by this Act.

Cl. (1)

The Ruler of a State is to intimate to the Crown his willingness to accede to the Federation by executing an Instrument of Accession. This Instrument, after its acceptance by the Crown under the provisions of subsection (1), will take effect after, and not before, the inauguration of the Federation, and for the purposes of the Federation. It will enable the federal authorities brought into existence by the Act to exercise the powers and the jurisdiction of the Ruler in respect of those matters which he has recognized as federal subjects. The authority of the Federation will be exercised strictly within the limits defined by the Instrument of Accession. Outside these limits, the sovereignty of the Indian States and their relations with the Crown will not be affected in any way by the Act.

Cl. (2)

Subject to the provisions of subsection (4), a Ruler in accepting a subject in the Federal List as a federal subject may attach limitations to the power to be exercised in respect of that subject by the Federal Legislature in relation to his State and also to the executive authority of the Federation which follows from the authority of the Federal Legislature. Some of the States may provide for the exception or reservation of certain subjects in the Instrument of Accession either because of the existing treaty rights or because they have enjoyed special privileges (as for example in connexion with postal arrangements, currency or coinage) in matters which may be the concern of the Federation. This does not, however, involve power to qualify the provisions of the Act itself.

Cl. (4)

The Federation of India is a union between the Provinces and those States who have joined by a formal Instrument of Accession. After the Federated States have joined, they cannot withdraw. On the other hand, the conditions on which they have agreed to join the Federation should not be altered prejudicially. So there should not be any alterations or amendments in this Act on

[1] J.C.R. 155-6.

matters which affect the Federated States; any such amendment will not, without the consent of the Ruler, apply to any Federated State. The Second Schedule mentions the provisions of this Act which may be amended without affecting the validity of an Instrument of Accession. For instance, in Part II, Chapter II of this Act, provisions regarding the exercise by the Governor-General on behalf of His Majesty of the executive authority of the Federation regarding the functions of the Council of Ministers, regarding the special responsibilities of the Governor-General, or regarding the peace or tranquillity of India, may not be amended without affecting the validity of the Instrument of Accession. But on the other hand, s. 16 of this Act regarding appointment, dismissal, etc. of the Advocate-General may be amended without affecting the Instrument.

This subsection reserves full powers to the Crown to reject any proposals for an Instrument of Accession by an individual State, and, in particular, if it appears that the terms thereof are inconsistent with the scheme of Federation embodied in the Act. There is no obligation on the Crown to accept an accession when the exceptions or reservations sought to be made by the Ruler are such as to make the accession illusory or merely colourable.[1] The Instrument will not be accepted unless the Ruler agrees therein to the provisions of ss. 147 and 149.

The proviso makes it clear that an Instrument of Accession, once accepted, is to be conclusive as to the extent of federal authority, both legislative and executive, in relation to the State.

The Second Schedule specifies the provisions of the Act which may be amended without affecting the accession of a State. The Act which is an Act of the British legislature may be amended by Parliament. But if the amendments relate to sections of the Act outside the Second Schedule, they will not extend the jurisdiction of the Crown or of any federal authority in an Indian State, unless its Ruler accepts the amendments by executing a supplementary Instrument of Accession.

Cl. (5)

Cl. (7)

The object is to get the States to join the Federation quickly. So a time limit of twenty years is provided, after which it is made difficult for a State to join the Federation.

Cl. (9)

The Federal Legislative List refers to the list mentioned in s. 100(1) below, viz. List I in the Seventh Schedule.

1 See J.C.R. 156.

CHAPTER II

THE FEDERAL EXECUTIVE

INTRODUCTION

The old Act

Under the old Act (s. 33), the superintendence, direction and control of the civil and military government of India was vested in the Governor-General in Council who was to obey all the orders of the Secretary of State. The Governor-General was assisted by an Executive Council appointed by His Majesty by warrant under the Royal Sign Manual, the number of the members of the Council being such as His Majesty thought fit to appoint. In practice, the number of members was six excluding the Governor-General and the Commander-in-Chief who was ordinarily, though not necessarily, a member of the Council and who in that case ranked next after the Governor-General. Not less than three of the members must have been in the service of the Crown in India for at least ten years. These were all members of the Indian Civil Service. Another member was to be a barrister or pleader of at least ten years' standing. The tenure of office was in practice five years. The Governor-General appointed a vice-president who presided at meetings of the Council in his absence. In case of difference of opinion, the Governor-General had a second or casting vote. But if any measure was proposed before the Council whereby in his judgement the safety, tranquillity or interests of British India or any part thereof was materially affected, he could overrule the Council.[1] The Governor-General in Council was not responsible to the Indian Legislature, but only to the Secretary of State, and ultimately to the British Parliament. The Governor-General in Council, if satisfied that any demand for supply refused or reduced by either Chamber of the Legislature was essential for the safety, tranquillity or interests of British India, could act as if it had been assented to. He could also, in case of emergency, authorize such expenditure as he thought necessary for the safety or tranquillity of British India.

The new Act

The new Act vests the entire executive power and authority of the Federation in the Governor-General as the representative of the King. The Governor-General will also exercise such prerogative powers (not being powers inconsistent with the Act) as His Majesty may be pleased to delegate to him.[2] The supreme command of the military, naval and air forces is vested in the Governor-General, although power has been reserved to His Majesty to appoint a Commander-in-Chief to exercise in relation to military and air forces such powers as may be assigned to him. In relation to Federated States, the executive authority will only extend to such matters as their Rulers have accepted as falling within their Instruments of Accession. The Act further provides the Governor-General with a Council of Ministers, chosen and summoned by him and holding office during his pleasure, to aid and advise him in exercise of the powers conferred on him by the Act except in relation to powers relating to (1) defence, external affairs and ecclesiastical affairs, (2) the

[1] Old Act, ss. 36–41.

[2] S. 3.

administration of British Baluchistan, and (3) such other matters as are left by the Act *to his discretion*. Besides, in respect of certain specified matters which have been transferred to the control of ministers, the Governor-General is declared to have a 'special responsibility' and the Instrument of Instructions will direct him to be ordinarily guided by the advice of ministers in the sphere in which they have the constitutional right to tender it, unless in his opinion, one of his special responsibilities is involved, in which case he will be at liberty to act in such manner as he judges requisite for the fulfilment of the special responsibility even though this may be contrary to the advice which his ministers have tendered. In these and in certain other specified matters within the sphere of ministerial responsibility, he is to act in the exercise of his *individual judgement*. See below under IN HIS DISCRETION: IN HIS INDIVIDUAL JUDGEMENT.[1]

Powers of the Governor-General

The powers of the Governor-General are partly derived from the Act and partly from the Letters Patent, which authorize, empower and command him to do all things that belong to his office in accordance with the Letters Patent and the Instrument of Instructions[2] and any laws in force in India. The Governor-General must always be held to possess all the powers necessary for meeting any emergency which may require him to take immediate action for the safety of India and, in particular, the Act makes provisions in case of failure of the constitutional machinery embodied in this Act, and in that case the Governor-General may assume to himself all or any of the powers vested in, or exercisable by, any federal body or authority.[3] As the Joint Parliamentary Committee[4] puts it:

> The Governor-General, in whom the exclusive responsibility for the defence of India is vested, must necessarily be free to act according to his own judgement, when the peace or tranquillity of India or any part of India is threatened, even if he finds himself thereby compelled to dissent from the advice tendered to him by his ministers within their own sphere.

The federal Government is, under the Act, a *dyarchical Government*,[5] the Governor-General's ministers having the constitutional right to tender advice to him on the administration of a portion only of the affairs of the Federation, while the administration of the other portions remains the exclusive responsibility of the Governor-General himself. The ministerial control is not co-extensive with the federal Government's activities. Certain departments which are concerned with defence, external affairs and ecclesiastical affairs are entrusted to the Governor-General personally, and these matters he will control in responsibility to His Majesty's Government in Great Britain and the British Parliament. Moreover, in the exercise of certain powers specified by this Act, by the Governor-General *at his discretion*, he will be entitled to act without seeking advice from his ministers. Lastly, in respect of matters in which the ministers have the constitutional right to tender advice to him, he need not be guided by that advice if its acceptance be inconsistent with the fulfilment of any of the purposes for which he has been declared by the Act to be charged with a 'special responsibility', in which case, the Governor-General must act, notwithstanding the advice

1 See J.C.R. 165.
2 See s. 13.
3 See ss. 43, 45 and 102.
4 169.
5 J.C.R. 34 and 38.

tendered to him, in such manner as he deems requisite for the discharge of those 'special responsibilities'.[1]

The Governor-General has been empowered by the Act to appoint, at his discretion, not more than three *counsellors*, for the purpose of assisting him in the administration of defence, external affairs and ecclesiastical affairs. These matters will remain outside the ministerial sphere and the Governor-General's responsibility with respect to them will be to the Secretary of State and ultimately to Parliament. In respect of the federal matters in which he is to act in his discretion as also in respect of matters in which he dissents from the ministerial advice, the Governor-General is required[2] to obey such instructions as are contained in the Instrument of Instructions as well as such other instructions as he may receive from time to time from the Secretary of State for India, although disobedience to such instructions will not invalidate any act of the Governor-General; a dissolution, for instance, would be valid, even though it was made contrary to the direction of the Secretary of State.

Financial adviser and counsellors

The Governor-General will have a financial adviser to advise him on the safeguarding of the financial stability and credit of the Federal Government. To the extent of his activities, the scope of the Finance Minister will be diminished. The former will be responsible to the Governor-General, the latter to the Legislature. Further the counsellors will advise the Governor-General as to matters of defence and will shape the budget for defence. The military finance and the military accounts departments, now under the Finance Minister, will be transferred to the department of Defence; so the scope of activities of the Finance Minister will be still further diminished. To prevent the chance of friction between the financial adviser and the Finance Minister, it has been recommended by the Joint Parliamentary Committee that the assistance and advice of the financial adviser will be available to the ministry, and that the Governor-General will always endeavour to secure the appointment of a person as such adviser, who will be acceptable to the ministers; and clause (4) of this section provides that in making the selection (after the first appointment which may be made before ministers are appointed), the Governor-General is to consult the ministers as to the person to be selected, though the appointment will be made at his discretion. Further, the federal ministry, specially the Finance Minister, will be consulted before the proposals for defence expenditure are finally settled. So in matters of finance, there will be a threefold responsibility: (1) that of the financial adviser to the Governor-General regarding the ensuring of the financial stability and credit of the Federation; (2) that of the counsellors to the Governor-General for defence; (3) that of the Finance Minister regarding other matters of finance to the Legislature.

Position of the Governor-General

The place of the King in the British polity is taken in the Dominions by a representative of the Crown, generally styled the Governor-General (except in Newfoundland). He is charged by statute with the most varied duties, and in addition, he exercises by grant from the Crown the whole ambit of the royal prerogative, in so far as is necessary for the administration of the Government of the Dominions, including the prerogative of mercy. He was originally regarded as the representative or agent of

[1] See below under IN HIS DISCRETION: IN HIS INDIVIDUAL JUDGEMENT.
[2] See s. 14.

the British Government in that particular Dominion. But at the Imperial Conference of 1926, after the declaration of Dominion autonomy, the following resolution was passed :

> It is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by H.M. the King in Great Britain, and that he is not the representative or agent of H.M.'s Government in Great Britain or of any department of that Government.

Since 1927, a new rule has been adopted that communications between the Dominions and England no longer pass through the Governor-General, but go direct from the Dominion Government to His Majesty's Government in England.[1]

In India, the position of the Governor-General is very different. Under the new Act, he is in many matters, the representative or agent of His Majesty's Government in India. In matters in which the Governor-General is to act in his discretion and in which he is to act in his individual judgement—matters which cover a wide range of functions,[2]—the Governor-General under s. 14 of the new Act is, subject to the Instrument of Instructions, under the general control of the Secretary of State, and is to follow the particular directions from time to time given to him by the Secretary of State ; so in these matters he is controlled generally and specifically by His Majesty's Government in England.

The Governor-General's authority is derived from his Commission and limited to the powers thereby expressly or impliedly entrusted to him. The executive power of the Governor-General, save by special delegation, does not extend to declaring war, making peace, entering into negotiations with foreign powers, accrediting or receiving diplomatic agents, making treaties or taking other similar action.[3]

Subject to the provisions of the Act, the executive authority of the Federation is to be exercised by the Governor-General as the representative of the King. The constitutional position of the Governor-General is defined in s. 7(1), which provides generally for the government of the Federation, and in s. 7(2) which provides for the exercise of powers conferred on the Governor-General by other provisions of the Act. The Governor-General will also exercise such prerogative powers (not being inconsistent with the Act) as His Majesty may be pleased to delegate to him. Some of these powers are laid down in the warrant of appointment which has a statutory basis, and should be distinguished from the Instrument of Instructions. The most important of these functions is the exercise of the royal prerogative to grant pardons, free or conditional, to offenders, convicted by courts of justice.[4] But in the exercise of some (though not all) of the statutory powers, the Governor-General is required by the Act to pay due obedience to such directions as may from time to time be given to him by the Secretary of State.[5] The provisions of s. 7 may be compared with similar sections of the statutes governing some of the Dominions. S. 9 of the Canada Act, which

[1] See Keith's *Dominion Autonomy in Practice*, 1929, pp. 3–5, 33.

[2] See list given below under IN HIS DISCRETION : IN HIS INDIVIDUAL JUDGEMENT.

[3] See s. 11.

[4] See s. 295.

[5] See s, 14.

provides for the constitution of Canada, is as follows: 'The executive government and authority of and over Canada is hereby declared to continue and be vested in the Queen.' S. 15 of the same Act runs as follows: 'The Commander-in-Chief of the land and naval militia and of all naval and military forces of and in Canada, is hereby declared to continue and be vested in the Queen.' The corresponding sections of the Australia Act, 1909, are as follows: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative and extends to the execution and the maintenance of the constitution and of the laws of the Commonwealth.'

S. 68 provides: 'The Commander-in-Chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.'

S. 8 of the Africa Act provides: 'The executive Government of the Union is vested in the King and shall be administered by His Majesty in person or by a Governor-General as his representative.' S. 9 of the same Act is as follows: 'The Governor-General shall be appointed by the King and shall have and may exercise in the Union during the King's pleasure, but subject to this Act, such powers and functions of the King as His Majesty may be pleased to assign to him.'

S. 17 provides: 'The Commander-in-Chief of the naval and military forces within the Union is vested in the King or in the Governor-General as his representative.'

In India the Crown is, as in the Dominions, an integral part of the executive government of the Federation. Under s. 1 of the old Act, India was governed by and in the name of His Majesty, but the executive government in India, namely, the Governor-General in Council, had under s. 33 of the old Act only certain delegated functions of superintendence, direction and control, subject to the superior control of the Secretary of State who was responsible to Parliament. India, in the words of Lord Curzon, is 'a subordinate branch of the British Government'. Although under the Act, the Crown is an integral part of the federal Government as also of the provincial Government, India has not attained the position of the Dominions, in view of s. 14 of the Act.[1]

Governor-General and Governor

The Governor-General, as such, has no powers over the Indian States except those which the Act confers on him, for the administration of federal subjects in Federated States. He possesses however certain wide powers over the provincial Governors. He can require them, under s. 54, to comply with such directions as he may issue to the Governors from time to time on all subjects where they are, under the Act, to act in their discretion or in exercise of their individual judgement; where the Governor reserves bills passed by the provincial Legislature for the consideration of the Governor-General, the latter can assent, withhold his assent or send them back to the provincial Legislatures for further consideration or reserve them for the signification of His Majesty's pleasure.[2] The Governor-General, under s. 88(1) Prov. (b), exercises certain control over the Governor in respect of Governor's ordinances. Under s. 123, the Governor-General may direct a Governor to discharge, as his agent,

[1] See the discussion on the Position of India in International Law and the League of Nations in the notes to s. 11.

[2] See s. 76.

certain specified functions over tribal areas, and also certain specified functions in relation to the Reserved departments.'

Special responsibilities

These special powers of the Governor-General may be described by the compendious term, 'safeguards'. Sir Samuel Hoare made the following observations on the subject:

> I regard safeguards not as a stone wall that blocks the road but as a hedge on each side, which no good driver ever touches, but which prevent people on a dark night from falling into the ditch. They are not intended to obstruct real transfer of responsibility. They are not intended to impede the day-to-day administration of any federal minister. They are rather ultimate controls, that we hope will never need to be exercised, for the greater assurance of the world outside, both in India itself and Great Britain.

The Joint Select Committee in their Report[1] state:

> They are not only not inconsistent with some form of responsible government, but in the present circumstances of India it is no paradox to say that they are the necessary complement to any form of it, without which it could have little or no hope of success.

These safeguards, in their opinion, are designed to supply the following essential elements in the new constitutional settlement:

(1) the need for flexibility so that opportunity may be afforded for the natural process of evolution with a minimum of alteration in the constitutional framework itself which will be further secured by indicating in the Instrument of Instructions, how far the Governor-General and the Governor are bound by English precedent and analogy;
(2) the necessity for securing a strong executive;
(3) the need for an efficient administration; and
(4) the necessity for an impartial authority to hold the scales even between conflicting interests.

Reasons for vesting wide discretionary powers in the Governor-General and Governors have been stated thus in the Report of the Joint Select Committee:

> The dominant consideration is the one which we have already emphasized—the vital importance in India of a strong executive. It has seemed to us in the course of our discussions with the British India delegates that, in their anxiety to increase the prerogatives of the legislature, they have been apt to overlook the functions of the executive. But if the responsibility for government is henceforward to be borne by Indians themselves, they will do well to remember that to magnify the legislature at the expense of the executive is to diminish the authority of the latter and to weaken the sense of responsibility of both. The functions of the executive is to govern and to administer; that of the legislature to vote supply, to criticize, to educate public opinion and to legislate; and great mischief may result from attempts by the latter to invade the executive sphere. It follows from these considerations that the only way of strengthening the provincial executive is to confer wide discretionary powers. The responsibilities are defined and the powers conferred not for the purpose of superseding ministers

[1] Pars. 21–5.

> or enabling them to escape responsibilities which properly belong to them but primarily in order that the executive as a whole may possess the authority which experience shows to be essential to the success of parliamentary government. . . We hope and are willing to believe that it will never become necessary to put this power into operation; but its existence in the background together with the whole body of the Governor's reserve powers, may well prove the most effective guarantee, for the development of a genuine system of responsible government.[1]

The scope of these reserved powers and responsibilities was stated by Mr Ramsay Macdonald, Prime Minister of Great Britain, as follows:

> There is one great danger inherent in these safeguards which I will mention because it is of the utmost importance in the working of the constitution. Ministers responsible must not shield themselves from taking upon their own shoulders when it is unpopular, by leaving the Viceroy or the Governor to put into operation his reserved powers. The provision of reserved powers is necessary in the circumstances and some such reservation has indeed been incidental to the development of most free constitutions. But every care must be taken to prevent conditions from arising which will necessitate their use. It is, for instance, undesirable that ministers should trust to the special powers of the Governor-General as a means of avoiding responsibilities which are properly their own, thus defeating the development of responsible government by bringing into use special powers meant to lie in reserve and in the background. In his evidence before the Joint Select Committee, Sir Samuel Hoare emphasized that the two sides of the Government will work closely and sympathetically together and that, year by year, the Governor-General and the Governor will have less and less reason to intervene in the field that the ministers themselves will be ensuring that the rights contemplated in the field of special responsibilities are safeguarded and as in other parts of the Empire as the Governments develop, powers of that kind fall into desuetude—not because the powers are unnecessary but because the ministers themselves carry these powers into effect.[2]

It will be noticed that the Governor has no special responsibility for safeguarding the financial stability and credit of the provincial Government, unlike that of the Governor-General for the federal Government. For the reason for this difference, see notes under s. 52.

The Governor-General and ministers

The relation of the Governor-General to his ministers must ultimately be governed by constitutional practice rather than by provisions of positive law. As the Joint Parliamentary Committee say,[3] it would be undesirable to seek to define the Governor-General's (or the Governor's) relations with his ministers by imposing a statutory obligation upon him to be guided by their advice, since to do so would be to convert a constitutional convention into a rule of law, and thus perhaps to bring it within the cognizance of the courts. The declaration of special responsibility of the Governor-General (or of the Governor) with respect

[1] Pars. 111 and 114.

[2] See J.C.R., pars. 165, 168–71 (regarding the special responsibility of the Governor-General), and 78–84 (regarding that of the Governor).

[3] See Report, pars. 74 and 75.

to any matter does not mean or even suggest that on every occasion when the question relating to that matter comes up for decision, the decision is to be that of the Governor-General (or the Governor) to the exclusion of his ministers. In no sense does such declaration define a sphere from which the action of the ministers is excluded. It does no more than indicate a *sphere of action* in which it will be constitutionally proper for the Governor-General, after receiving ministerial advice, to signify his dissent or to act in opposition to it if he thinks fit. The Instrument of Instructions will indicate the relations which will normally prevail. The Reserved departments of the federal Government will be administered by the Governor-General on his own responsibility and his counsellors in these departments will be responsible to him alone, and will share none of the responsibility of the federal ministers to the Federal Legislature. In practice, it will be impossible for the Governor-General to conduct the administration of these departments in isolation from the other activities of the Government. It will often be found necessary to keep the ministers and the counsellors in the closest contact. Without divesting himself of his own personal responsibility for the Reserved departments, he is so to arrange the conduct of executive business that he himself, his counsellors, and his responsible ministers are given the fullest opportunity of mutual consultation and discussion of all matters which call for co-ordination of policy. This principle has been incorporated in the Governor-General's Draft Instrument of Instructions.[1] The Instrument also formally recognizes the fact that the defence of India must, to an increasing extent, be the concern of the Indian people and not of the British Government.

In the departments which have been entrusted to the charge of ministers responsible for the conduct of their administration to the Legislature, the Governor-General will, except to the extent and in the circumstances explained below, be guided by the advice tendered by his ministers. The Governor-General has a *special responsibility*, not for spheres of administration, but for certain clearly indicated general purposes, and for securing those purposes, he is to exercise the powers conferred upon him by the Act in accordance with directions contained in his Instrument of Instructions. The matters or purposes in respect of which the Governor-General has been declared by the Act to have a special responsibility in relation to the operations of the federal Government have been enumerated in s. 12 of the Act.

There is a third category of matters in which the Governor-General will not be under any constitutional obligation to seek ministerial advice. The Act specifies the powers which it confers on the Governor-General as being exercisable 'at his discretion.'[2]

Vote of No Confidence

Under the old Act, this question could only arise in the provincial Council in the case of ministers holding charge of the Transferred departments. The matter was regulated by Rule 12A of the Bengal Legislative Council Rules in Bengal, and similar rules in the other Provinces. Rule 12A of the Bengal Legislative Council Rules ran thus:

> 12A.—(1) A motion expressing want of confidence in a minister or a motion disapproving the policy of the minister in a particular respect may be made with the consent of the President and subject to the following restrictions, namely:

[1] Par. xvii. See under COUNCIL OF MINISTERS below.

[2] See below under IN HIS DISCRETION: IN HIS INDIVIDUAL JUDGEMENT.

(a) leave to make the motion must be asked for after questions and before the list of business for the day is entered upon;

(b) the member asking for leave must before the commencement of the sitting of the day leave with the Secretary a written notice of the motion which he proposes to make.

(2) If the President is of opinion that the motion is in order he shall read the motion to the Council and shall request those members who are in favour of leave being granted to rise in their places and if not less than 46 members rise accordingly, the President shall intimate that leave is granted and that the motion will be taken on such day, not being more than ten days from the day on which leave is asked, as he may appoint. If less than 46 members rise the President shall inform the member that he has not the leave of the Council.

Under the new constitution, there will be ministers both in the federal and in the provincial Legislatures, who will have to depend on the votes of the members. The Legislature may pass a vote of no confidence in them. This matter will be, as under the old Act, regulated by rules—made under new s. 38 (Federal Legislature), and new s. 84 (Provincial Legislature), but there will be some difference. Under the old Act, rules regulating the course of business in the Legislature were made by the Governor-General with the sanction of the Secretary of State in Council, and could not be altered by the Legislature. But under new ss. 38 and 84, each Chamber of the federal or of the provincial Legislature may make rules for regulating its procedure and conduct of business. It is not provided in the Act whether a motion of no confidence is to be made in the Upper or the Lower Chamber. In the English Parliament, the vote of the House of Commons decides the matter; but under the new constitution, the position and power of the Lower and the Upper Houses of the Federal Legislature, except in matter of finance, are very similar. So in India, the question of responsibility of the ministers to any particular Chamber or to both Chambers of the Legislature is left open in the Act, but will be settled by convention as in England. In most countries within the British Empire, the point has been settled by convention or usage in favour of the Lower House. In England, the ministry is responsible to the House of Commons; similarly in Canada and in Australia. Marriott observes: 'The menace to the Cabinet principle involved in the existence of two chambers, virtually co-ordinate in power and still more in the formation of a federal union was not unforeseen', and the Australian constitution contains elaborate provisions for the avoidance of deadlocks and for appeal to the electorate by the referendum. One way of avoiding the deadlock created by the ministry retaining the confidence of one house, but forfeiting that of the other, would be by the convening of a joint session, but the more satisfactory way would be the establishment of a convention that the will of the Lower House will prevail. For, after all, as Professor Keith says, the Upper Houses have no originating financial powers, and this should be enough to debar them from claiming power over the ministry. As to whether a vote of no confidence should entail the resignation of the ministry as a whole, or only of a particular minister, that question again will be regulated by convention. The ministry may choose to regard a vote of no confidence in a particular minister as one directed against them as a whole; it will

be against the principle of collective responsibility to hold otherwise. It will be within the competence of either Chamber to make rules regulating motions of no confidence ; but these rules cannot regulate in any way the question of the results which would follow from the carrying of such motion in that Chamber. All questions regarding the resignation of ministers or the exercise of the Governor-General's or of the Governor's power to dismiss ministers will be regulated by political practice and convention, and not by any rules framed by the Legislature. In Bengal, the convention has grown up that the passing by the Legislature of a vote of no confidence in a minister has been followed by his resignation which has been accepted by the Governor.

Council Secretary

Under old ss. 43A and 52, it was open to the Governor-General or the Governor at his discretion to appoint, from among the members of the Legislature, Council Secretaries who are to hold office during his pleasure and discharge such duties in assisting the Cabinet as he may assign to them. As was pointed out in the First Report of the Joint Select Committee on the Government of India Bill (1919), this provision was inserted to allow of the selection of members of the Legislature who will be able to undertake duties similar to those of Parliamentary Under-Secretaries in England.

This provision has been omitted in the new Act, but there is nothing to prevent the Federal or the Provincial Legislature from passing an Act to provide for the appointment and pay of persons who, while members of the Legislature, will assist the ministers in the performance of their duties, like the Parliamentary Secretaries and Under-Secretaries in England. The Federal or the Provincial Legislature will then have to provide that such offices are not to be regarded as offices of profit under s. 26(1) (*a*)—Federal, or s. 69(1) (*a*)—Provincial. The need for such assistance will be the greater under the new constitution, as official secretaries of the various departments cannot be members of the Legislature. In England, most of the parliamentary heads of departments have the assistance, as Anson says, in administration and in debate, of a parliamentary subordinate. For instance, the First Lord of the Treasury is assisted in Parliament by the Patronage Secretary, who is *ex officio* the Chief Whip. The Financial Secretary to the Treasury assists the Chancellor of the Exchequer. Every Secretary of State has the assistance of a Parliamentary Under-Secretary. The Presidents of the Boards of Trade, Local Government, and Education have each a Parliamentary Secretary. The Secretary of State for War is assisted by a Financial Secretary and also by an Under-Secretary. An Under-Secretary is appointed by a letter from the Secretary of State ; a Parliamentary Secretary by a minute of the Board (which for these purposes is the President). Similar persons may have to be appointed to help the ministers in the Legislatures in India.[1]

The council of ministers

The council of ministers will be appointed by the Governor-General and will hold office during his pleasure ; it is to aid and advise him in the exercise of the powers conferred on him by this Act other than : (1) the powers relating to defence, external affairs and ecclesiastical affairs which are *Reserved departments* as described in the White Paper and the Report of the Joint Parliamentary Committee (in the Act, this phrase has been omitted) and are directed and controlled by him on his sole

[1] See Anson, *Law and Custom of the Constitution*, 4th ed., 1935, Vol. II, Part I, pp. 206, 212, 216 and 223.

responsibility [1]; (2) the administration of British Baluchistan; and (3) matters left by this Act to the Governor-General's *discretion*.[2] In the matters in which he is to seek the advice of his ministers, he is to be guided by it, unless in his opinion so to be guided would be inconsistent with the fulfilment of his *special responsibilities* or with the proper discharge of any of the functions which he is otherwise required to exercise on his *individual judgement*.[3] But there is no statutory obligation that he is to be guided by ministerial advice.[4]

Appointment of ministers

In making such appointments, the Governor-General, as provided in paragraph viii of the Draft Instrument of Instructions, is to consult the person who is most likely to command a stable majority in the Legislature, and to appoint those persons (including so far as practicable representatives of the Federated States and members of important minority communities) who will best be in a position collectively to command the confidence of the Legislature.[5] A minister may be a nominated member of the Council of State. In the Provinces, the Council of Ministers is entitled to tender advice to the Governor on all matters which fall within the scope of provincial administration, other than those in respect of which the Governor has the right to exercise powers at his discretion. But the transfer of responsibility at the centre will not be co-extensive within the range of the activity of the federal Government. So dyarchy at the centre will prevail to some extent.[6] There will be some *Reserved departments* which the Governor-General will control in responsibility to His Majesty's Government and Parliament. The ministers will not be entitled to tender advice in the exercise of any prerogative powers of the Crown delegated to him in the Letters Patent constituting the office. For instance, the ministers will have no right to advise him on the grant of honours, should this prerogative of His Majesty be delegated to him.

Ministers should be members of the Legislature either at the time of appointment or within six months thereafter.[7] The Joint Parliamentary Committee[8] discussed the suggestion put forth by the Simon Commission[9] that the Governor (or the Governor-General) ought not to be thus restricted in his choice and should have the power, if necessary, to appoint a minister from outside the Legislature. But the Report pointed out that such appointment would be of little value as against the widespread dislike and suspicion which such a provision would undoubtedly arouse. The Joint Parliamentary Committee therefore rejected the suggestion.

Salary of ministers

Under s. 52(1) of the old Act, a minister of a Governor's Province is to be paid the same salary as a member of the Executive Council, unless a smaller salary is provided by vote of the Legislative Council. As often pointed out, this provision led to much difficulty, and has been the cause of unstable ministries; it has also militated against the

[1] See W.P. Intr. 14, 15; W.P. Prop. 11, 12; J.C.R. 172–8, 184–6, 211, 214.

[2] See W.P. Intr. 14, 24, 33; W.P. Prop. 11, 12, 18, 19; J.C.R. 165.

[3] See notes below.

[4] J.C.R. 74.

[5] See notes under s. 3.

[6] J.C.R. 34 and 38.

[7] W.P. Prop. 13, 66; ss. 10(2) and 51(2), new Act. This is the same as in s. 52(2), old Act.

[8] 85–8.

[9] Report, Vol. II, 48.

growth of a system of *joint responsibility* (another reason being, no doubt, the existence of dyarchy within the Cabinet). With the abolition of dyarchy within the Cabinet, steps have been taken in the new constitution to ensure the formation of a system of joint responsibility in the Cabinet. The Simon Commission in their Report [1] suggested that it should be provided in the constitution that ministerial salaries are not liable to be reduced or denied by a vote of supply; and that the existing scale of salaries should be alterable only by statute regularly passed through all its stages. They also suggested that it should be constitutionally established that the only vote of censure which could be proposed would be one against the ministry as a whole carried after notice. The Report of the Joint Parliamentary Committee [2] dealt with the question of collective responsibility of ministers, and in paragraph 113 they approved of the suggestions made by the Simon Commission referred to above, and said: 'There is every reason why ministers in India should refuse to treat a hostile vote, even on a demand for supply, as necessarily entailing resignation; it may even be desirable that a ministry should only resign on a direct vote of no confidence.'

Ss. 10(3) and 51(3) of the new Act, provide that ministers' salaries are to be fixed by statute, in accordance with the suggestion of the Simon Commission as above. Those salaries are a *charge on the revenue* under ss. 33(3) (*c*) and 78(3) (*c*), and are not to be altered during the minister's term of office. Though they may be discussed in both Chambers of the Legislature, they are non-votable.[3]

In his discretion: in his individual judgement

Certain specific powers are by this Act conferred on the Governor-General (as also the Governor) and are expressed as being exercisable *in or at his discretion.* In these matters, he will be entitled to act without seeking advice from his ministers.[4] As explained in the note to s. 232 under DEFENCE, the Governor-General will himself direct and control the three Reserved departments of Defence, External Affairs and Ecclesiastical Affairs, in respect of which subjects ministers cannot tender any advice.[5] In these matters, he has sole or exclusive responsibility, being responsible only to the Secretary of State and thus ultimately to Parliament. Next, according to the White Paper [6] come certain specific powers to be conferred on the Governor-General by the new constitution which are exercisable *at his discretion* without the necessity of seeking the advice of his ministers. Thirdly come other matters on which ministers will tender advice and the Governor-General will be guided by that advice, unless to be so guided would in his judgement, be inconsistent with any *special responsibility* imposed upon him by the new constitution, in which case, he is to act, notwithstanding his minister's advice, in such manner as he judges requisite for the due fulfilment of his special responsibility. But there is no statutory obligation upon the Governor-General or the Governor to be guided by ministerial advice, since to do so would be to convert a constitutional convention into a rule of law and thus perhaps to bring it within the cognizance of the courts.[7] He is to have special responsibility not for spheres of administration, but for certain clearly indicated general

1 Vol. II, 46.
2 Pars. 112-13.
3 W.P. Prop. 49 and 98, J.C.R. 148.
4 See ss. 9 and 50(1).
5 J.C.R. 172.
6 Intr. 14, 24, 33 and W.P. Prop. 11-12, 18-19.
7 J.C.R. 74.

purposes, as laid down in the White Paper,[1] e.g. for preventing commercial discrimination, for safeguarding the legitimate interests of minorities, etc. The White Paper and the Report of the Joint Parliamentary Committee apparently confine the exercise of judgement by the Governor-General, in spite of ministerial advice, to the case of special responsibilities mentioned in the White Paper [2] but the new Act introduces the new phrase *in his individual judgement* to cover a number of other matters as well. Paragraph ix of the Draft Instrument of Instructions lays down that in all federal matters except those functions which the Governor-General is to exercise in his discretion, he 'shall in the exercise of the powers conferred upon him be guided by the advice of his ministers, unless in his opinion so to be guided would be inconsistent with the fulfilment of any of the special responsibilities which are by the said Act committed to him, or with the proper discharge of any of the functions which he is otherwise by the said Act required to exercise on his individual judgement; in any of which cases our Governor-General shall, notwithstanding his ministers' advice, act in exercise of the powers by the said Act conferred upon him in such manner as his individual judgement seems requisite for the due discharge of the responsibilities and functions aforesaid.'[3] Under the new Act, the Governor-General (or the Governor) may act in his individual judgement, within the sphere of ministerial responsibility, contrary to his minister's advice, not only in the discharge of his special responsibilities but also of other functions assigned to him under the Act.[4]

There is some difference between the recommendation in the White Paper and the Report of the Joint Parliamentary Committee [5] regarding *exclusive or sole responsibility* and matters committed to the *discretion* of the Governor-General, on the one hand, and the actual provisions regarding these matters in the new Act, on the other. In the former, the following classification was contemplated:

A. Exclusive or sole responsibility for the Reserved departments;
B. Matters in his discretion; and
C. Matters within the scope of ministerial advice in some of which, however, he, in the discharge of his special responsibilities may act against such advice.

In the new Act, on the other hand, A and B have been grouped together as matters in his discretion, the phrase 'Reserved departments' being dropped; and C has been amplified, and the new phrase *in his individual judgement* added so as to include therein other matters besides his special responsibilities.

Reserved departments [6]

In the administration of these three departments, the Governor-General will be advised by three counsellors.[7] Under this head of Reserved departments also comes the administration of British Baluchistan.[8]

In the new Act, the following sections deal with the Governor-General acting in his discretion: Ss. 9 and 10—Ministers' appointment, etc.; s. 11(1)—Reserved departments and tribal areas; s. 14(1)—Control by Secretary of State over its exercise; s. 15—Financial adviser; s. 17(5)—

[1] Intr. 24 and 25.
[2] W.P. Intr. 25 and Prop. 18 and J.C.R. 394(1) Railway.
[3] See notes under s. 3.
[4] See the list given below.
[5] W.P. Intr., 14, 24, 33; W.P. Prop. 11, 12, 18 and 19; J.C.R. 165.
[6] See s. 11 below and J.C.R. 165 and 172.
[7] See notes to s. 232 under DEFENCE.
[8] J.C.R. 165. See s. 95 below.

Conduct of business of federal Government; s. 19—Summoning, etc. of Legislature; s. 20—Address and message to Legislature; s. 26(1) (*e*)—Removal of disqualification; s. 31(3)—Power to summon immediate Joint Session; s. 32(1)—Assent, etc. to Bills; s. 33(4)—Expenditure charged on federal revenues; s. 38(2) and (3)—Rules of procedure in Legislature; s. 40(2)—Restriction of discussion on Bills; s. 43(1) and (5)—Power to promulgate ordinances; s. 44(5)—Power to enact Acts; s. 45(6)—Power to issue Proclamation; ss. 88(1) Prov. and 89(5)—Governor's ordinance; s. 90(5)—Concurrence for Governor's Acts; s. 94(3)—Appointment of Chief Commissioner; s. 95—Administration of British Baluchistan; s. 102—Proclamation of emergency; s. 104(2)—Residual powers of legislation; s. 108—Previous sanction for legislation; s. 111(3)—Suspension of law applicable to British subjects domiciled in the United Kingdom; s. 126(4) and (5)—Orders to Governor; s. 128(2)—Directions to Ruler of Federated State; s. 129(4)—Broadcasting complaints; s. 131(9)—Complaints re. water supply; s. 138(2) Prov. (ii)—Directions re. income-tax; s. 153—Previous sanction re. Reserve Bank or Currency legislation; s. 163(4)—Refusal of consent by Federation to provincial loan; s. 170(2)—Conditions of service of Auditor of Home Accounts; s. 175(1) Prov.—Concurrence to sale of official residence; s. 182(1)—Appointment of members of Railway Authority; s. 182(2)—Bills amending Eighth Schedule; s. 183(4)—Power re. Railway Authority; s. 187—Fixing of amount due by Railway Authority to Federation; s. 195—Rules re. construction of Railway; s. 196(1) and (8)—Appointment of Railway Tribunal; s. 199—Appointment of Railway Directors; s. 202—Appointment of temporary Chief Justice of Federal Court; s. 206(3)—Previous sanction for Bill enlarging appellate jurisdiction of Federal Court; s. 213—Power to consult Federal Court; s. 214(1)—Approval of rules of Federal Court; s. 222—Appointment of temporary High Court judges; s. 226(2)—Previous sanction for Bill giving High Court revenue jurisdiction; s. 244(4)—Report to Secretary of State re. recruitment of services; s. 242(4) Prov. (*a*)—Appointment of Federal Court officers; s. 251, Prov.—Appointment, etc. of staff of Auditor of Home Accounts; s. 265—Appointment of members of Public Service Commission; s. 266(3)—Regulations re. federal services; s. 267 Prov. (*a*)—Sanction for Bill extending functions of the Commission; s. 270(1)—Consent to proceedings against officials; s. 271—Previous sanction for Bill affecting protection to public servants; s. 295(1)—Commutation of death sentence; s. 299(3)—Previous sanction for Bills affecting private rights, including those over land; s. 305—Appointment of Secretarial Staff; s. 308(1)—Opinion re. proposed amendments to Act; First Schedule, Part II, r. 4, Prov. (*a*), and Rr. 14 and 15(iii)—Representation of Indian States in Federal Legislature.

It will be for the Governor-General in his discretion to determine whether in any matter he is, under the Act, to act in his discretion, or to exercise his individual judgement; see s. 9(3).

In the new Act, the following sections deal with the Governor acting in his discretion: Ss. 50 and 51—Appointment of ministers; s. 57—Provisions as to crimes of violence; s. 58—Non-disclosure of sources of information; s. 59—Conduct of business of provincial Government; s. 69(1) (*a*)—Removal of disqualification; s. 62—Summoning, etc. of Legislature; s. 63—Address and message to Legislature; s. 74(2)—Power to summon immediate Joint Session; s. 75—Assent, etc. to Bills; s. 76—Reservation of Bills; s. 78(4)—Expenditure charged on provincial revenues; s. 84—Rules of procedure for Legislature; s. 86(2)—Restriction

of discussion of Bills; s. 89—Power to promulgate ordinances; s. 90—Power to enact Acts; s. 92—Power re. excluded and partially excluded areas; s. 93(5)—Power to issue Proclamations; s. 108(2)—Previous sanction for certain legislation; s. 111(3)—Suspension of law applicable to British subjects domiciled in the United Kingdom; s. 123(3)—Discharge of duties as agent of Governor-General; s. 175(1)—Concurrence to sale of official residence; s. 226(2)—Previous sanction for Bill giving High Court revenue jurisdiction; s. 242(4) Prov. (*a*)—Directions re. appointment of High Court officers; s. 265—Appointment to Public Service Commission; s. 267, Prov. (*a*)—Previous sanction for Bill enlarging functions of the Commission; s. 271—Previous sanction to Bill affecting protection to public servants; s. 270(1)—Consent to proceedings against officials; s. 299(3)—Previous sanction for Bills affecting private rights, including those over land; s. 305—Appointment to secretarial staff; s. 308(1)—Opinion re. proposed amendment of Act.

In the Act, the following sections deal with the Governor-General exercising his individual judgement: S. 12—Special responsibilities; s. 14(1)—Control by Secretary of State over its exercise; s. 16—Appointment, etc. of Advocate-General; s. 31(1)—Power to hold joint sitting; ss. 42 and 43—Power to issue ordinances; s. 44(1)—Message to Legislature; s. 119(3) and (4)—Power to disallow certain regulations and law; s. 129(5)—Power to regulate broadcast matters; s. 152(2)—Nomination, etc. of Reserve Bank Directors; s. 151(2)—Provision as to custody of public moneys; s. 183(4)—Special responsibility re. Railway Authority; s. 184(1)—Rules for conduct of business of Railway Authority; s. 196(8)—Expenses of Railway Tribunal; s. 216(2)—Administrative expenses of Federal Court; s. 246(2) (*a*)—Appointment to reserved posts; s. 248(1) and (2)—Power re. complaints by, and punishment of, officials; s. 258(1) (*a*)—Abolition of civil posts; s. 258(2) (*a*)—Order affecting pay of central services; s. 262(5)—Eligibility to office of non-British subjects; s. 271(2) (*a*)—Power re. prosecution of federal officials; s. 271(3)—Power re. costs incurred by official in defence; s. 277(3)—Individual judgement and special responsibility towards dependents of officials; s. 300(1) and (2)—Protection of rights of landholders and pensioners; s. 302(1)—Appointment of High Commissioner.

In the Act, the following sections deal with the Governor exercising individual judgement: S. 50(1), Prov.—Exercise of individual judgement; s. 52—Special responsibility; s. 54(1)—Control by Secretary of State over its exercise; s. 55—Appointment, etc. of Advocate-General; s. 56—Police rules; s. 88 and 89(1)—Ordinances; s. 90(1)—Power to enact Acts; s. 119(3) and (4)—Power to disallow certain regulations and law; s. 151(2)—Provision as to custody of public moneys; s. 228(3)—Expenditure for High Court; s. 246(2) (*b*)—Appointments to provincial reserved posts; s. 247(2) and (3)—Promotion or punishment of certain officials; s. 248(1) and (2)—Power re. complaints by, and punishment of, certain officials; s. 254(1)—Appointment, etc. of district judges; s. 258(1) (*b*)—Protection of existing civil servants; s. 262(5)—Eligibility for office of non-British subjects; s. 271(2) (*b*)—Power re. prosecution of provincial officials; s. 277(3)—Individual judgement and special responsibility towards dependents of officials; s. 296(3)—Salary of members of Revenue Courts of Appeal; s. 300(1) and (2)—Protection of landholders and pensioners; s. 303(3)—Appointment of Sheriff.

The following sections of the Act deal with special responsibilities:

Governor-General—Ss. 12, 40(2), 184(2), 277(3) and 313(4).

Governor—Ss. 52, 57(4), 83(3) and 277(3).

Legislative Powers of the Governor-General: See Introduction to Part II, Chapter IV.

The Governor-General

7.—(1) Subject to the provisions of this Act, the executive authority of the Federation shall be exercised on behalf of His Majesty by the Governor-General, either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor-General any functions conferred by any existing Indian law on any court, judge or officer, or on any local or other authority. Functions of Governor-General

(2) References in this Act to the functions of the Governor-General shall be construed as references to his powers and duties in the exercise of the executive authority of the Federation and to any other powers and duties conferred or imposed on him as Governor-General by or under this Act, other than powers exercisable by him by reason that they have been assigned to him by His Majesty under Part I of this Act.

(3) The provisions of the Third Schedule to this Act shall have effect with respect to the salary and allowances of the Governor-General and the provision to be made for enabling him to discharge conveniently and with dignity the duties of his office.[1]

The executive power and authority of the Federation rest in the Governor-General as representative of the King. For the extent of executive authority of the Federation, see s. 8. Under s. 18 of the Act, His Majesty, represented by the Governor-General, is to form part of the Federal Legislature. In Canada the Parliament consists of the King, the Senate and the House of Commons; in Australia, the federal Parliament consists of the King (represented by the Governor-General), the Senate and the House of Representatives; similarly, in South Africa, the Parliament consists of the King, the Senate and the House of Assembly. The Governor-General will exercise the powers conferred on him by this Act as executive head of the Federation, including the supreme command of the forces in India, and also certain prerogative powers of the Crown delegated to him. The Governor-General is to be aided and advised by a council of ministers responsible to a Legislature containing representatives both of British India and of the States.[2] The Legislature cannot confer on the Governor-General or upon a Governor any functions conferred by any existing Indian law on any court or judge.[3]

[1] See old Act, s. 33; W.P. Intr. 14; W.P. Prop. 6–8; J.C.R. 165: cf. Functions of Governor—s. 49 below. See notes to ss. 2(2) and 3(1) above.

[2] See s. 9 below.

[3] See s. 49 below.

Cl. (1) For the *Executive authority of the Federation*, see s. 8. For *Transitional Provisions*, see s. 291(1). *Existing Indian law* is defined in s. 289(2) as any law, rule, ordinance, etc. passed by any legislative authority in India.

On the position of the Governor-General, see notes to s. 2(2) above. In the exercise of his powers, the Governor-General will act in accordance with the Instrument of Instructions issued to him by the King. For Instrument of Instructions, see notes to s. 3 and s. 14 and notes thereunder.

Cl. (2) The powers under s. 3(1) (*b*) above refer to the prerogative powers of the Crown which may be delegated to the Governor-General by Letters Patent constituting the office. The exercise of such powers does not fall within the sphere of federal administration. The Governor-General may, for instance, exercise the prerogative of granting honours (which is a prerogative of His Majesty), if His Majesty be pleased to delegate a limited power for that purpose; similarly in the case of the Governor. For Letters Patent, see notes under s. 3.

Cl. (3)[1] The former salary was Rs.2,56,000, as compared with Rs.2,50,800, the salary under the new Act. The salary and allowances are charged on the revenues of the Federation.[2] Payments in respect of his personal allowances or of salaries of his personal and secretarial staff will be fixed by Order in Council.[3] The salary of the Governor-General, his personal allowance, the salaries and allowances of his personal and secretarial staff, are non-votable and are charged on the revenues of the Federation.[4] They cannot even be discussed in the Legislature.[5]

For allowances and customs privileges of the Governor-General, see the Third Schedule.

The allowances and customs privileges of Governors and acting Governors have been laid down in the Government of India (Governors' Allowances and Privileges) Order, 1936.

Extent of executive authority of the Federation

8.—(1) Subject to the provisions of this Act, the executive authority of the Federation extends—

(*a*) to the matters with respect to which the Federal Legislature has power to make laws;

(*b*) to the raising in British India on behalf of His Majesty of naval, military and air forces and to the governance of His Majesty's forces borne on the Indian establishment;

(*c*) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance, or otherwise in and in relation to the tribal areas:

[1] See s. 85 and Second Schedule, old Act, W.P. Prop. 10.

[2] See s. 33(3) below.

[3] See W.P. Prop. 10 and the Third Schedule to this Act, par. 2. For the Governor-General's staff, see J.C.R. 189.

[4] See s. 33(3) below.

[5] See s. 34(1) below.

Provided that—

(i) the said authority does not, save as expressly provided in this Act, extend in any Province to matters with respect to which the Provincial Legislature has power to make laws;

(ii) the said authority does not, save as expressly provided in this Act, extend in any Federated State save to matters with respect to which the Federal Legislature has power to make laws for that State, and the exercise thereof in each State shall be subject to such limitations, if any, as may be specified in the Instrument of Accession of the State;

(iii) the said authority does not extend to the enlistment or enrolment in any forces raised in India of any person unless he is either a subject of His Majesty or a native of India or of territories adjacent to India; and

(iv) commissions in any such force shall be granted by His Majesty save in so far as he may be pleased to delegate that power by virtue of the provisions of Part I of this Act or otherwise.

(2) The executive authority of the Ruler of a Federated State shall, notwithstanding anything in this section, continue to be exercisable in that State with respect to matters with respect to which the Federal Legislature has power to make laws for that State except in so far as the executive authority of the Federation becomes exercisable in the State to the exclusion of the executive authority of the Ruler by virtue of a Federal law.

Cl. (a): For the power of the Federal Legislature to make laws, see ss. 99–106 and 108–10 below and notes thereunder.

Cl. (b): See note on DEFENCE under s. 232 below.

Cl. (c)[1] Tribal areas are defined in s. 311(1). The Governor-General has special responsibilities in connexion with the tribal and trans-border areas in the North-West Frontier Province.[2] The Governor of this Province has special responsibility in respect of any matter affecting his responsibilities as Agent of the Governor-General in these areas. The Governor-General is the Agent-General for the tribal tracts on the borders of the Province.[3] The Simon Commission endorse the recommendation of the North-West Frontier Enquiry Committee (which was set up in April, 1922, under the chairmanship of Mr Denys Bray) that the responsibility for the administra-

[1] See W.P. Prop. 5–8; J.C.R. 165.

[2] See W.P. Prop. 70(*h*); J.C.R. 78 and 82.

[3] See J.C.R. 78 and 82.

tion of the five administered districts forming the Province cannot be separated from responsibility for the peace of, and control over, the tribal areas.[1] Tribal areas are included in India.

N.-W.F. Province

Until recently, the N.-W.F. Province formed one of six Chief Commissioners' Provinces in India. It is now a Governor's Province.[2] It falls under two divisions: (1) the British area of the five administered districts of Dera Ghazi Khan, Peshawar, Kohat, Bannu and Dera Ismail Khan, and (2) the tribal areas to the north-west of the five districts up to the Durand Line which marks the agreed boundary between the area of British influence over tracts and the area claimed by Afghanistan or under its influence. The mountainous area which used to be called 'independent territory' is, for the purpose of control, now divided by the Durand Line between the two sovereign powers. Up to 1901, the five frontier districts were included in the Punjab. In 1901, it was decided that the conduct of external relations with the tribes on the frontier should be more directly than hitherto under the control and supervision of the Government of India, and these five districts were taken over and a separate frontier province created under a Chief Commissioner under the Government of India. This is now a Governor's Province.

For the special responsibility of the Governor of the N.-W.F. Province for the tribal areas, see s. 52(2) below; for Bills affecting tribal areas requiring previous sanction before introduction, see ss. 108 (1) (c) and 2 (c).

Cl. (1), Prov. (i)

One of the essential features of a federal state is that there is a division made of governmental functions between the central organization and its constituent parts. This distribution of powers requires that the authority which deals with one, will not deal with the other. The proviso precludes the Federation from dealing with such powers, as have been, under the provisions of this Act, exclusively assigned to the Provinces. Likewise, the Federation will have no jurisdiction to make laws for the Federated States except in respect of subjects which have been surrendered to the Federation by their Rulers by their Instruments of Accession.[3]

Save, as expressly provided in this Act: See Part VI of this Act.

Cl. (1), Prov. (ii)

This proviso which is to be construed subject to subsection (2), confers executive authority upon the Federation in relation to a matter with respect to which the Federal and also the State Legislature have concurrent power to make laws which apply in that State, even though no such law has actually been passed by the Federal Legislature. But such authority can only be exercised subject to the provisions of the Instrument of Accession. With respect to a matter included in the Federal List of subjects which has been accepted by a Ruler in his Instrument of Accession, the law enacted by the Federation will apply to that State. The executive authority of the State, however, will continue in respect of its laws, being laws not inconsistent with any federal law applying in that State.[4] There is really no exclusive list for the Federal Legislatures with respect to the Indian States, for, under the provisions of subsection (2), the Federated States retain their executive authority even on matters accepted by the

1 See Sim. C.R., Vol. I, Part IV, Chapter V and Vol. II, Part III, Chapter I.

2 The peculiar position of the N.-W.F. Province is described in Sim. C.R., Vol. I, 359–64.

3 See Part V of the Act.

4 See subsec. (2).

States to be federal, provided there is no repugnancy between state laws and federal laws. But, in case of conflict, the federal law shall prevail.[1] The executive authority of the State will only be superseded by the executive authority of the Federation when the latter is exercised in virtue of a federal law prevailing in that State.

This refers to a prerogative power of the Crown. Under s. 223, His Majesty or any person to whom he may be pleased to delegate his power, can grant commissions in the forces in India. The delegation of power may be under s. 2(2) of this Act. For grant of commissions to the forces in India by His Majesty or by any person authorized by him, see s. 223. The proviso is to be read along with cl. (1) (*b*). Nobody can be recruited in British India to the naval, military or air forces if he is a foreigner.

Cl. (1), Prov. (iii)

Administration of Federal Affairs

Council of ministers

9.—(1) There shall be a council of ministers, not exceeding ten in number, to aid and advise the Governor-General in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion :

Provided that nothing in this subsection shall be construed as preventing the Governor-General from exercising his individual judgment in any case where by or under this Act he is required so to do.

(2) The Governor-General in his discretion may preside at meetings of the council of ministers.

(3) If any question arises whether any matter is or is not a matter as respects which the Governor-General is by or under this Act required to act in his discretion or to exercise his individual judgment, the decision of the Governor-General in his discretion shall be final, and the validity of anything done by the Governor-General shall not be called in question on the ground that he ought or ought not to have acted in his discretion, or ought or ought not to have exercised his individual judgment.[2]

The section prescribes the maximum number of ministers to be appointed under the Act, but in any particular ministry the number is to be fixed by the Governor-General in his discretion, subject to the condition that the number may not exceed ten.

Relation between the Governor-General and his ministers

Under s. 52(3) of the old Act the Governor of a Province is to be 'guided by' the advice of his ministers in all matters relating to the transferred subjects, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that

[1] See s. 107(3).

[2] See old Act, ss. 36–41 and 92; W.P. Intr. 14; W.P. Prop. 13–15; J.C.R. 61, 71–4, 165-6, 175–7 and 187; ss. 10 and 33(3) (c) below.

advice. The present Act, which does not contain any such provision, requires the ministers 'to aid and advise' the Governor-General. His relations with his ministers are to be determined by the Instrument of Instructions.[1] The Joint Select Committee think it would be undesirable to seek to define the Governor's relations with his ministers by imposing a statutory obligation upon him to be guided by their advice, since to do so would be to convert a constitutional convention into a rule of law, and thus, perhaps, to bring it within the cognizance of the courts.[2]

For *Council of Ministers, Appointment of Ministers,* see Introduction to this Chapter under these headings; *In His Discretion: In His Individual Judgement:* See Introduction to this Chapter under these headings.

Council Secretary

Under ss. 43A and 52 of the old Act, it was open to the Governor-General or the Governor at his discretion to appoint, from among the members of the Legislature, Council Secretaries who shall hold office during his pleasure and discharge such duties in assisting the Cabinet as he may assign to them. As was pointed out in the First Report of the Joint Select Committee on the Government of India Bill (1919), this provision was inserted to allow of the selection of members of the Legislature who will be able to undertake duties similar to those of Parliamentary Under-Secretaries in England. This provision has been omitted in the new Act.

Cabinet Responsibility: See Part III, Chapter II, Introduction, under this head.

Cl. (3). Final: This word is not commonly used in English statutes, but is very frequently to be found in Indian statutes, sometimes coupled with the phrase 'and not to be questioned in any court'. But whether the word 'final' is used alone or along with this phrase, the meaning is the same; in the case of subordinate bodies with delegated authority, so long as they act *bona fide* and *intra vires*, their decision cannot be questioned in a court.[3] But here the position of the Governor-General under this subsection and of the Governor under s. 50(3) is very much higher. No court of law can in any way take cognizance of matters to be decided by the Governor-General or the Governor in his discretion or in his individual judgement. The exercise of his powers as provided here cannot in any way be questioned, even if alleged to be done *mala fide* or without proper enquiry. It is not open to the court to enquire whether in that particular matter he should have taken ministerial advice and should have been guided by it, or whether he was wrong in regarding it as within the scope of his individual judgement. Neither the Governor-General nor the Governor is under any statutory obligation to be guided by ministerial advice in the sphere of ministerial responsibility.[4] There is, therefore, it is submitted, a complete ouster of the court's jurisdiction. Further, it is provided in s. 10(4) and in s. 51(4) that the question as to what advice, if any, was given by the ministers cannot be enquired into in any court. So whether the Governor-General or the Governor acts without consulting his ministers, or against their advice, either in the sphere of matters in his individual judgement or in the sphere of ministerial responsibility, in every case he is beyond the jurisdiction of the court.

[1] Par. ix.

[2] J.C.R. 73-4.

[3] *Bhaisankar* v. *Municipal Corporation of Bombay,* (1907) 31 Bom. 604; *Allcroft* v. *Lord Bishop of London* [1891] A.C. 666; *Rex* v. *London County Council* [1915] 2 K.B. 466.

[4] J.C.R. 74.

10.—(1) The Governor-General's ministers shall be chosen and summoned by him, shall be sworn as members of the council, and shall hold office during his pleasure. Other provisions as to ministers

(2) A minister who for any period of six consecutive months is not a member of either Chamber of the Federal Legislature shall at the expiration of that period cease to be a minister.

(3) The salaries of ministers shall be such as the Federal Legislature may from time to time by Act determine and, until the Federal Legislature so determine, shall be determined by the Governor-General:

Provided that the salary of a minister shall not be varied during his term of office.

(4) The question whether any and, if so, what advice was tendered by ministers to the Governor-General shall not be enquired into in any court.

(5) The functions of the Governor-General with respect to the choosing and summoning and the dismissal of ministers, and with respect to the determination of their salaries, shall be exercised by him in his discretion.[1]

The qualification of a minister is that, if not already a member, he must get himself elected to either House of the Federal Legislature or nominated to the Upper House within six months of his appointment; otherwise he will cease to be a minister.[2] In addition to such overriding powers as the Governor-General possesses over his ministers, the Governor-General may, whenever he thinks fit, dismiss the entire ministry, or any individual minister.[3] A minister or a ministry may be dismissed by the Governor-General if he thinks proper, after a vote of no confidence passed by the legislature. This matter will be regulated by convention.[4]

Cl. (3): See Introduction to this chapter under SALARY OF MINISTERS. Under s. 52(1) of the old Act, it was open to the Legislature to vote on a Demand for Grant, a smaller salary to a provincial minister than to a member of the Executive Council. The distinction between a minister and a Councillor has been abolished, and the pay of a minister is to be provided by a regular statute passed by the Legislature, as recommended by the Simon Commission in their Report.[5] For a provincial minister, see s. 51(3) below.

Cl. (4): See notes to s. 9(3) above.

Cl. (5): In his discretion: See Introduction to this chapter under this title. Under cl. (3) above, until the Legislature fixes the salary

[1] See W.P. Intr. 14, W.P. Prop. 13–15; J.C.R. 165-6, 187; and Introduction to this Chapter and notes to s. 9 above.

[2] See s. 52(2), old Act.

[3] See Introduction to this Chapter under GOVERNOR-GENERAL AND MINISTERS; COUNCIL OF MINISTERS; APPOINTMENT OF MINISTERS.

[4] See Introduction to this Chapter under VOTE OF NO CONFIDENCE.

[5] Vol. II, 46.

by statute, the salary of a minister is to be determined by the Governor-General. He is not in any way bound to consult his ministers as to the exercise of his discretion in this matter.

Provisions as to defence, ecclesiastical affairs, external affairs, and the tribal areas

11.—(1) The functions of the Governor-General with respect to defence and ecclesiastical affairs and with respect to external affairs, except the relations between the Federation and any part of His Majesty's dominions, shall be exercised by him in his discretion, and his functions in or in relation to the tribal areas shall be similarly exercised.

(2) To assist him in the exercise of those functions the Governor-General may appoint counsellors, not exceeding three in number, whose salaries and conditions of service shall be such as may be prescribed by His Majesty in Council.

Reserved departments[1]

These are the departments of defence, ecclesiastical affairs, and external affairs.[2] These departments are outside the ministerial sphere and are within the exclusive jurisdiction of the Governor-General who is responsible to the Secretary of State and thus ultimately to Parliament for their administration. The expenditure for these departments is charged on the revenues of the Federation by s. 33(3) (*e*) of the new Act, subject, in the case of the ecclesiastical affairs, to a maximum of Rs.42 lakhs, besides pension charges.

Defence

See J.C.R. 173–83, and notes to s. 232 below under DEFENCE.

Ecclesiastical affairs[3]

Ss. 115–23, old Act, provided for ecclesiastical establishment in British India. The jurisdiction of the Bishops of Calcutta, Madras, and Bombay, who were to be appointed by His Majesty, was regulated by s. 115, old Act, which also provided that the Bishop of Calcutta was to be the Metropolitan Bishop in India subject to the general superintendence of the Archbishop of Canterbury, and that the Bishops of Madras and Bombay were to be subject to the Bishop of Calcutta. The salaries and allowances of the three Bishops and of the Archdeacons appointed by them were fixed by the Secretary of State. To provide for the spiritual needs of the British troops in India and also of the European members of the Indian Civil Service, he established and maintained a cadre of official chaplains and authorized grants-in-aid out of the Indian revenues for the maintenance of churches and a certain number of non-official chaplains. The total annual ecclesiastical expenditure at the time of the Joint Parliamentary Committee's Report was about Rs. 40 lakhs. The Indian Church Act, 1927[4] and the Indian Church Measure, 1927, made the Church in India an autonomous body, and ss. 115–21 of the old Act were repealed

[1] See old Act, ss. 33, 67A(3) (*v*) and (4), 115–23; cf. APPENDIX I.
[2] W.P. Prop. 11; J.C.R. 172.
[3] See J.C.R. 185-6; and s. 269 below (Chaplains).
[4] 17 & 18 Geo. 5, c. 40. Amended by the Government of India (Adaptation of Acts of Parliament) Order, 1937, Part III, Schedule.

by the first Act, so that Indian Bishops are no longer to be appointed by His Majesty.

Under the new constitution, many of the powers of the Secretary of State pass to the federal Government, but the department of ecclesiastical affairs is (like other reserved departments) under the sole charge of the Governor-General, subject to the general control of the Secretary of State. The autonomous Indian Church requires financial assistance from the state, and any sudden curtailment of such assistance might gravely embarrass it; but such Church will have in course of time to depend less and less upon this assistance. The policy of the Government of India has been gradually to reduce ecclesiastical expenditure so that it may be ultimately devoted only for the spiritual needs of the Army and, within reasonable limits, of the civil officials. The Report of the Joint Parliamentary Committee[1] suggested that a maximum limit for ecclesiastical expenditure should be fixed in the Act itself. This has been done in s. 33(3) (c) of the new Act at Rs. 42 lakhs exclusive of pension charges. It was also suggested that as over 90 per cent. of the official chaplains are kept for the Army, ecclesiastical expenditure should be under the control of the department of defence and should not be classified as civil expenditure.

Under s. 123 of the old Act, the Governor-General in Council, could, with the sanction of the Secretary of State, make grants to any Christian community, outside the Church of England and the Church of Scotland, for purposes of instruction or maintenance of places of worship. This provision has been omitted in the new Act.

In his discretion : See notes to s. 9 above under this heading.

Tribal areas : See notes to s. 8(c) above under this heading.

Cl. (2): counsellors[2]

As stated in the Report of the Joint Parliamentary Committee,[3] the counsellors, being responsible to the Governor-General alone, cannot be members of the Council of Ministers, and can share none of the responsibilities of the ministers to the Federal Legislature. But the Committee hope that the counsellors will be freely admitted to the deliberations of the ministers, and that there will be free resort by both parties to mutual consultation. This suggestion has been adopted in paragraph xvii of the Governor-General's Draft Instrument of Instructions. The salaries and allowances of counsellors are a charge on the revenues of the Federation and are non-votable. A suggestion is made that one counsellor may be placed at the head of the staff of the Governor-General.[4]

External affairs[5]

Under the old constitution, the Foreign department, of which the Governor-General himself held the portfolio, was only concerned with the relations of the Government of India on the one hand, and foreign countries or the frontier tracts of India on the other, and not with the relations between the Government of India and the Dominions. The term 'external affairs' was not intended to include the latter; this is now laid down in the section itself.[6]

It is to be noted that the term 'external affairs' does not include relations with the Indian States in matters in which they have not agreed to federate, such matters being dealt with personally by the Viceroy as

1 Par. 186.
2 See notes to s. 232 below under DEFENCE.
3 J.C.R. 187.
4 J.C.R. 189.
5 See W.P. Intr. 14; W.P. Prop. 11; J.C.R. 34, 38, 172, and 184.
6 J.C.R. 184.

representative of the Crown. So any state matter which has not been made federal by the Ruler's Instrument of Accession cannot be discussed in either the Federal or the Provincial Legislature, unless the Governor-General or the Governor considers that British Indian interests are affected.[1]

In affairs connected with foreign countries (other than those in close proximity to India) the Governor-General must act under the directions of the British Government (communicated to him through the Secretary of State) and through its agencies.[2] Even in the case of territories in proximity to India, external affairs are under the control of the British Foreign Office. India has no power to appoint diplomatic agents to Nepal and Afghanistan, although the Consuls in Afghanistan, Nepal, Tibet, Persia, Arabia, Kashgar, and Iraq are usually selected from the Political department of the Government of India. Communications with the League of Nations and the International Labour Organization (other than those on routine matters) pass through the British Foreign Office. But the Governor-General has authority over the British representatives in the Persian Gulf.[3]

The Crown retains control of prerogative authority of making treaties with foreign states. While the terms of a treaty may be negotiated in India between the representatives of India and those of a foreign power, it must be signed by the accredited representatives of His Majesty. All treaties are entered into by the King who can act through the Governor-General as well as through a Secretary of State.[4]

Trade agreements

Although the making of commercial or trade agreements with foreign countries is essentially a matter for which the Minister of Commerce in the federal Government should be responsible, all agreements are to be made through the department of external affairs. Agreements of any kind with a foreign country must be made by the Governor-General, even if on the merits of a trade or commercial issue, he may be guided by the advice of the minister.[5]

Fiscal convention: relation between India and the Dominions

The relations between India and the Dominions fell under the purview of the Government of India which had the power to enter into agreements and conventions with the Dominions direct without going through the Imperial Government. For instance, in January 1927, after a conference between representatives of the Governments of the Union of South Africa and of India, an agreement was arrived at regarding General Hertzog's Colour Bar Bill. The resolutions of the Imperial Conferences of 1917 and 1918 recognized the right of India and of the Dominions to regulate immigration at pleasure, subject to the principle that visits for pleasure, business (as opposed to labour), or education should be facilitated.[6] The Joint Select Committee on the Government of India Bill (1919) in dealing with clause 33 of the Bill stated as follows :

[1] See J.C.R. 165, footnote 2, and ss. 38(1), Prov. (c), and 84(1), Prov. (c), new Act.

[2] See s. 14.

[3] Kuwait Order in Council, 1935.

[4] See APPENDIX I : DOMINIONS, INDIA AND THE LEAGUE OF NATIONS.

[5] See J.C.R. 184.

[6] For other examples, see *post* APPENDIX I under INDIA IN INTERNATIONAL LAW AND THE LEAGUE OF NATIONS, Introduction to Part V, Chapter III and s. 118 and notes thereto.

India's position in the Imperial Conference opened the door to negotiation between India and the rest of the Empire, but negotiation without power to legislate is likely to remain ineffective. A satisfactory solution of the question can only be guaranteed by the grant of liberty to the Government of India to devise those tariff arrangements which seem best fitted to India's needs as an integral portion of the British Empire. It cannot be guaranteed by statute without limiting the ultimate power of Parliament to control the administration of India, and without limiting the power of veto which rests in the Crown; and neither of these limitations finds place in any of the statutes in the British Empire. It can only therefore be assured by an acknowledgement of a convention. Whatever the right fiscal policy for India, for the needs of her consumers as well as for her manufacturers, it is quite clear that she should have the same liberty to consider her interests as Great Britain, Australia, New Zealand, Canada and South Africa. In the opinion of the Committee therefore, the Secretary of State should as far as possible avoid interference on this subject when the Government of India and its Legislature are in agreement, and they think that his intervention, when it does take place, should be limited to safeguarding the international obligations of the Empire or any fiscal arrangement within the Empire to which His Majesty's Government is a party.

The fiscal convention, as suggested above, was adopted. The Secretary of State's dispatch of 30 June 1921 formally put on record that he had on behalf of His Majesty's Government accepted the principle recommended by the Joint Select Committee. As a result of the establishment of the fiscal convention, the Indian Fiscal Commission, under the Hon'ble Sir Ibrahim Rahimtoola, was appointed by the Government of India in 1922 to examine with reference to all the interests concerned the tariff policy of the Government of India, including the question of the desirability of adopting the principle of imperial preference. In paragraph 264 of the Report of the Commission, it was stated that in discussing the question of imperial preference, they had confined their consideration to preferences granted to England, but with regard to other parts of the Empire, they recommended a different policy and the Commission went on to say:

> We suggest that to the United Kingdom should be offered such preferences as India may find she is able to offer without appreciable injury to herself. With regard to other parts of the Empire, we recommend a policy of reciprocity such as is already adopted by more than one Dominion for inter-Dominion trade relations; that is to say preferences should be granted only as the result of agreements which might prove to the mutual advantage of both parties....The agreements we contemplate would be purely voluntary; there would be no kind of obligation on India to enter into them unless her own interests appeared to demand it; and it is evident that political considerations could not be excluded in determining whether it was desirable for India to enter into an economic agreement or not.

The principle of reciprocity between India and the Dominions has been recognized. In Indian legislation, there have been certain differentiations made against Dominion British subjects. India has been before the new constitution free to deal directly with the Dominions, and relations between India and the Dominions have been regulated by the

Government of India and not by the Imperial Government. So, as pointed out in the Report of the Joint Parliamentary Committee,[1] the expression 'external affairs' did not include relations between the Government of India and the Dominions. These would now fall within the sphere of ministerial responsibility. But the relations of India to, say, Afghanistan or Russia, would be regulated by the Governor-General at his discretion, under the general control or special directions of the Imperial Government through the Secretary of State.[2]

Special responsibilities of Governor-General

12.—(1) In the exercise of his functions the Governor-General shall have the following special responsibilities, that is to say,—

(*a*) the prevention of any grave menace to the peace or tranquillity of India or any part thereof;

(*b*) the safeguarding of the financial stability and credit of the Federal Government;

(*c*) the safeguarding of the legitimate interests of minorities;

(*d*) the securing to, and to the dependants of, persons who are or have been members of the public services of any rights provided or preserved for them by or under this Act and the safeguarding of their legitimate interests;

(*e*) the securing in the sphere of executive action of the purposes which the provisions of chapter III of Part V of this Act are designed to secure in relation to legislation;

(*f*) the prevention of action which would subject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment;

(*g*) the protection of the rights of any Indian State and the rights and dignity of the Ruler thereof; and

(*h*) the securing that the due discharge of his functions with respect to matters with respect to which he is by or under this Act required to act in his discretion, or to exercise his individual judgment, is not prejudiced or impeded by any course of action taken with respect to any other matter.

(2) If and in so far as any special responsibility of the Governor-General is involved, he shall in the exercise of his functions exercise his individual judgment as to the action to be taken.

[1] Par. 184.

[2] See s. 14.

The special responsibilities[1] do not in themselves confer any power on the Governor-General or the Governor which would not otherwise be within the range of executive authority of the Federation or the Province. The special responsibilities refer only to his relations with his ministers in the process of arriving at a decision as to action to be taken in the exercise of the executive authority of the Federation or the Province. This clause would not enable the Governor-General to take any action in a State which the federal Government was not otherwise competent to take in virtue of s. 8 read with the provision in the Legislative Lists and subject, therefore, in relation to any State, to any conditions and limitations attached by the Ruler to his acceptance of items in the Federal List. No power of intervention in a State by the Governor-General would flow from this clause.

The matters in respect of which special responsibility is imposed on the Governor-General fall within the administration of departments which under the Act have been transferred to the charge of ministers, responsible for their administration to the Federal Legislature. The section lays down that the Governor-General has a special responsibility for the purposes mentioned therein and for securing these purposes, he is to exercise the powers conferred on him under subsection (2), subject to the provisions of the Instrument of Instructions, under the control and the directions of the Secretary of State.[2] This special responsibility is not intended to exclude the ministers from tendering advice to the Governor-General or the Governor in regard to these matters and does not contemplate a separate sphere of administration from which the ministers have been ousted. The Governor-General or the Governor may, after receiving ministerial advice, signify dissent from it and act in opposition to it, if in his individual judgement the due fulfilment of his special responsibility so requires. But unless he feels called upon to differ from his ministers in the discharge of a 'special responsibility', the responsibility of ministers for the matters committed to their charge remains complete.[3]

Cl. (1) (*a*)[4]

This responsibility is not intended to confer on the Governor-General any special powers *vis-à-vis* the States in matters relating to the federal sphere proper nor has it any bearing on the relations between the Crown and the State. The special responsibility is very wide and is intended to cover grave menace to the peace and tranquillity of the country, not only by reason of terrorism, subversive movements and crimes of violence, which fall within the department of law and order, but also the menace arising out of ill-advised measures in other departments also; 'we can readily conceive circumstances in connexion with land revenue or public health to mention no others which might well have this effect'.[5] It may be that measures are proposed by the Federal Government acting within its constitutional rights in relation to a federal subject or in relation to a subject not directly affecting the State at all, which if pressed to a conclusion would affect prejudicially the rights of a State in relation to which that State had transferred no jurisdiction, or events may arise in a Province which would tend to prejudice the rights of a neighbouring

[1] See notes to s. 9 under this head. For the Governor's special responsibility, see s. 52 below.

[2] See s. 14.

[3] W.P. Intr. 26; W.P. Prop. 19.

[4] See W.P. Intr. 25–30 and 42; W.P. Prop. 14, 18–21; J.C.R. 169.

[5] Par. 79 of the Joint Select Committee Report.

State. In such cases, it must be open to the Governor-General or the Governor, as the case may be, to see that the particular course of action is so modified as to maintain the integrity of rights secured to the State by treaty or otherwise. Under this power, the Governor-General could interfere if the federal Government or a provincial Government took such action as would endanger the economic existence of a State. The word used is 'India' and not 'British India', so that his special responsibility covers the prevention of any grave menace to the peace or tranquillity in the territory of the Indian States.[1] The Governor-General must be free to act as he thinks proper when the peace or tranquillity of India or any part thereof is threatened, even if he finds himself thereby compelled to disregard the advice tendered by his ministers within their sphere.

Cl. (1) (b)[2]

This clause refers to the 'financial safeguards' of the federal constitution. Subject to the powers conferred upon the Governor-General by this responsibility and subject to the provisions of the Act regarding the Reserve Bank[3] the finance of the Federation has been entrusted to the ministers. Unless occasion arises for the exercise of the special powers mentioned in this section, it will be for the ministers and ministers alone to take decisions on all such matters as the means to be used for raising the necessary revenues, for allocating expenditure in the responsible field and for the programme of external and internal borrowing. The object of the Governor-General's special responsibility for 'safeguarding the financial stability and credit of the Federation' is to confer on him powers to step in, if the need should arise, in the event of the policy of his ministers, in respect, for example, of budgeting or borrowing being such as to be likely in the Governor-General's opinion to endanger seriously the provision of resources to meet the requirements of the reserved departments or any of the obligations of the Federation, whether directly or indirectly by prejudicing India's credit in the money markets of the world. This clause reserves to the Governor-General such powers in regard to budgetary arrangements and borrowing as would enable him to intervene if methods were pursued by responsible ministers as would in his opinion seriously prejudice the financial credit of the Federation. The definition of this special responsibility is drawn in wide terms owing to the difficulty of giving a detailed specification of financial operations or measures which might on occasion endanger stability and call for the use of the special powers.[4] In order that assistance may be available to him in the discharge of this special responsibility, the Governor-General has been empowered by the Act in his discretion to appoint a financial adviser, but after consultation with his ministers,[5] as to the person to be selected.

Cl. (1) (c)

The clause does not define the phrase 'legitimate interests', but secures means by which minorities may be assured of fair treatment at the hands of the majorities. It was suggested before the Joint Parliamentary Committee that the phrase should be more clearly defined and that it should be made clear that the minorities referred to are the racial and religious minorities generally included by usage in that expression. No doubt it will be the

[1] See the definition of 'India' in s. 311(1).

[2] See W.P. Intr. 31-32; J.C.R. 40, 165, 168–71; Instrument of Instructions, par. x.

[3] See s. 150.

[4] See W.P. Intr. 31.

[5] See s. 15.

five or six well-recognized and more important minorities in whose interests the special powers will usually be invoked, but there are other well-defined sections of the population who may from time to time require protection. The word 'minority' has not been used in a political or parliamentary sense. But this special responsibility is not intended to enable the Governor-General to stand in the way of social or economic reform merely because it is resisted by a group of persons who might claim to be regarded as a minority.[1]

Under s. 65(2) (*b*) of the old Act, previous sanction of the Governor-General was required for the introduction in either Chamber of the Indian Legislature of any measure affecting the religion or religious rites and usages of any class of British subjects in India. This has been dropped in the new Act. Legislation of this nature is such as ought to be introduced on the responsibility of ministers. In the sphere of social reforms, a point has been reached where further progress depends upon the assumption by Indians of real responsibility for Indian social conditions. Having regard to the fact that the habits and customs of the people are closely bound up with their religious beliefs, it was difficult for the Government to carry into effect social legislation, and it is becoming increasingly evident that obstacles to such legislation can be removed only by Indians. So matters of social reform, which may touch, directly or indirectly, Indian religious beliefs, can best be undertaken by Indian ministers.

Cl. (1) (*d*) The clause guarantees to the public servants in India not only their legal rights but also equitable treatment.[2]

Cl. (1) (*e*) This refers to provisions with respect to discrimination, etc.[3] Part V, Chapter III deals with legislative measures to prevent discrimination. This subsection deals with executive action with the same object. The Report of the Joint Parliamentary Committee [4] mentions that discrimination may of two kinds—administrative and legislative. With regard to administrative discrimination, a statutory prohibition would be impracticable and useless, for it would be impossible by statute to regulate the exercise of its discretion by the executive. So it is provided that the Governor-General or the Governor should have a special responsibility for the prevention of discrimination, so that if any action is proposed by the ministers which would in his opinion have a discriminatory effect, he may intervene and either refuse to accept their advice or exercise his special powers. It is suggested in the Report [5] that in the Constitution Act, it should be made clear that this special responsibility extends to the prevention of administrative discrimination in any of the matters in respect of which provision against legislative discrimination is made under the Act. This suggestion has been embodied in this subsection.

This clause deals with one aspect of 'commercial safeguards'. The problem of commercial discrimination is divisible into two entirely separate issues. One is the question of administrative and legislative discrimination against British commercial interests and British trade

1 See J.C.R. 78, 79, 141, 168, 321 and Instrument of Instructions, par. xi.

2 See Part X of this Act for the Public Services. Cf. W.P. Intr. 70–3; W.P. Prop. 180–94; J.C.R. 274–321. See Instrument of Instructions, par. xii.

3 Cf. W.P. Intr. 29; W.P. Prop. 122-23; J.C.R. 342–65; Instrument of Instructions, par. xiii.

4 Par. 348.

5 Par. 348.

in India. The other relates to discrimination against British and Burmese imports.[1] The subject of legislative discrimination is dealt with in Chapter III of Part V. This subsection will enable the Governor-General to interfere or to decline to accept the advice or to exercise the special powers in cases where the acceptance of ministerial advice involves discriminatory action in the administrative sphere against British commercial interests and British trade in India, and this will extend over all the matters in respect of which provisions against legislative discrimination has been made in the Act. The Governor-General can prohibit administrative discrimination between the rights of the British mercantile community, firms, and companies trading in India, and the rights of Indian-born subjects.

Cl. (1) (*f*)

The other issue is that of discrimination against British and Burmese imports. This is dealt with in clause (*f*). The fiscal relations between the United Kingdom and India have hitherto been regulated by what is known as the Fiscal Convention which was based on the recommendation of the Joint Committee on the Government of India Bill of 1919.[2] As soon as the new constitution begins to function, the convention will necessarily lapse. While the statutory safeguard prohibits the imposition of penal tariffs on British or Burmese goods or the application to them of penally restrictive regulations with the object not of fostering Indian trade but of injuring and excluding British or Burmese trade, it does not in any way affect the position of India in the British Empire which she has attained through the Fiscal Convention. The Joint Parliamentary Committee deny that the clause imposes unreasonable fetters upon the Federal Legislature for the purpose of securing exceptional advantages for British at the expense of Indian trade.[3] The principles of future trade relations between India and the United Kingdom were thus enunciated by the Joint Select Committee[4]:

> We think that the United Kingdom and India must approach their trade relations in a spirit of reciprocity, which views the trade between the two countries as a whole. Both countries have a wide range of needs and interests; in some of these each country is complementary to the other, while in some each has inevitably to look rather to a third country for satisfactory arrangements of mutual advantage. The reciprocity which as partners they have a right to expect from each other consists in a deliberate effort to expand the whole range of their trade with each other to the fullest possible extent compatible with the interests of their own people. The conception of reciprocity does not preclude either partner from entering into special agreements with third countries for the exchange of particular commodities, where such arrangements offer it advantages which it cannot obtain from the other; but the conception does imply that, when either partner is considering to what extent it can offer special advantages of this kind to a third country without injustice to the other partner, it will have regard to the general range of benefits secured to it by the partnership, and not merely to the usefulness of the partnership in relation to the particular commodity under consideration at the moment.

[1] See J.C.R. 342.

[2] See notes to s. 11 under FISCAL CONVENTION.

[3] J.C.R. 343.

[4] See par. 346.

The imposition of this special responsibility upon the Governor-General is intended to prevent penal and discriminatory action against British and Burmese trade. The scope of the Governor-General's powers attached to this special responsibility is not defined, but his Instrument of Instructions (paragraph xiv) gives him full guidance. It is made clear in that document that the statutory responsibility of the Governor-General is not intended to affect the competence of the federal Government and of the Federal Legislature to develop their own fiscal and economic policy, and that they possess complete freedom to negotiate agreements with the United Kingdom or other countries for the securing of mutual tariff concessions ; and that it will be his duty, in fulfilment of the special responsibility imposed upon him, to intervene in tariff policy or in the negotiation or variation of tariff agreements only if in his opinion the intention of the policy contemplated is to subject trade between the United Kingdom and India or between Burma and India, to restrictions conceived, not in the economic interests of India, but with the object of injuring the interests of the United Kingdom or of Burma. It has been further made clear in the Instrument of Instructions that the 'discriminatory or penal treatment' covered by the special responsibility includes both direct discrimination (whether by means of differential restrictions or imports) and indirect discrimination by means of differential treatment of various types of products and that the Governor-General's special powers can also be used to prevent the imposition of prohibitory tariffs or restrictions, if he is satisfied that such measures have been proposed for injuring British or Burmese trade in India. In all these respects, the expression covers measures, which though not discriminatory or penal in form, are so in fact.[1]

As stated in the Report of the Joint Parliamentary Committee,[2]

Cl. (1) (*g*) this special responsibility only applies where there is a conflict between rights arising under the Constitution Act and those enjoyed by a State outside the federal sphere. It may be necessary for the Governor-General to deal with such a conflict not only in his capacity as the executive head of the Federation, but also in his capacity as the representative of the Crown in its relation with the States; but his special responsibility must necessarily arise in his first capacity only, his capacity as Viceroy being untouched by this Act.[3] The definition of the Governor-General's (and Governor's) special responsibility in relation to the States provides the means of securing for the Rulers recognition of their personal status.

In all matters which affect the administration of the departments

Cl. (1) (*h*) where he is required to act in his discretion or to exercise his individual judgement, the Governor-General must have the right to take measures for the proper fulfilment of his duties even though it may mean interference in matters within the ministerial sphere.[4]

Cl. (2) For 'in his discretion' and 'in his individual judgement', see Part II, Chapter II, Introduction.

13.—(1) The Secretary of State shall lay before Parliament the draft of any Instrument of Instructions (including any Instrument amending or revoking an Provisions as to Instrument of Instructions

[1] See J.C.R. 347 and 357.

[2] Par. 171.

[3] See s. 3.

[4] See J.C.R. 171(*g*).

Instrument previously issued) which it is proposed to recommend His Majesty to issue to the Governor-General, and no further proceedings shall be taken in relation thereto except in pursuance of an address presented to His Majesty by both Houses of Parliament praying that the Instrument may be issued.

(2) The validity of anything done by the Governor-General shall not be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him.[1]

The Governor-General (or the Governor) will exercise the powers conferred on him by this Act as executive head of the Government and such other powers of His Majesty (not inconsistent with the provision of this Act) as His Majesty may be pleased by Letters Patent constituting the office of Governor-General (or Governor) to assign to him. The exercise of these powers by him will be regulated by the Instrument of Instructions issued to him by His Majesty.

For Letters Patent, see notes to s. 3.

The Act seeks to rely upon prerogative Instrument of Instructions for the purpose of adapting English constitutional practice to the conditions which obtain in India. The Governor-General or the Governor is to exercise the various powers conferred on him in accordance with instructions contained in that document.

The draft will be laid before both Houses of Parliament and each House will have an opportunity to make to His Majesty any representation it desires as to amendment or alteration of the Instructions. But neither House has any right to lay down how His Majesty's prerogative power in issuing or altering the Instrument of Instructions is to be exercised.

The Instrument of Instructions does not confer any new powers on the Governor-General. It neither defines nor creates legal rights and obligations. It lays down the manner in which the Crown's representative is to exercise the powers vested in him by law. And it is to the Crown and to Parliament alone and not to the courts that the Governor-General (or the Governor) is accountable for any breach of his Instructions—an accountability which, in the last resort, could be enforced by his removal from office. The Instructions are the interpretation that His Majesty's Government and Parliament place upon the provisions of the Act. Nothing can be inserted in the Instructions that is not within the framework of the Act.. But within this framework, the Instructions are mandatory. The Governor-General must obey them. If he does not choose to obey a particular instruction the subject cannot set up the Instruction in a court of law, for disobedience of Instructions does not invalidate the action of the Governor-General. An Act of Parliament cannot be read in the light of the Instrument of Instructions. The Act creates the rights and the Instructions interpret the way in which the Governor-General is to apply his duties in relation to those rights.

[1] See W.P. Intr. 23; W.P. Prop. 64; J.C.R. 76.

14.—(1) In so far as the Governor-General is by or under this Act required to act in his discretion or to exercise his individual judgment, he shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given to him by, the Secretary of State, but the validity of anything done by the Governor-General shall not be called in question on the ground that it was done otherwise than in accordance with the provisions of this section. Superintendence of Secretary of State

(2) Before giving any directions under this section the Secretary of State shall satisfy himself that nothing in the directions requires the Governor-General to act in any manner inconsistent with any Instrument of Instructions issued to him by His Majesty.[1]

The Secretary of State possesses little or no control over the administration of those subjects of the Federal Government which are, under the Act, in the charge of ministers, and in which the Governor-General is to be guided by such advice as may be tendered by them. In all other functions of the Federal Government whether or not they fall within the ministerial sphere, in the administration of which, the Governor-General can exercise his individual judgement, or within the sphere of his discretionary powers, he is under the general control of the Secretary of State and is required by this section to comply with such directions as may be given to him from time to time. By reserving to the Secretary of State the powers of superintendence, direction and control over many of the important acts and operations of the Federal Government, the Act makes the Governor-General the agent of the Secretary of State.

The provisions of the Act requiring the Governor-General or the Governor to act in his discretion in certain matters and in his individual judgement in other matters are not enforceable at law, nor can any complaint be heard in any court from an aggrieved party that the Governor-General or the Governor has not exercised the powers vested by the Act in this behalf. The Governor-General or the Governor is under the Act required to follow the Instrument of Instructions, the terms of which have been approved by Parliament. Failure on the part of the Governor-General or the Governor to act according to the Instrument of Instructions will not affect the validity of his act.[2] But in case he habitually fails to act according to the Instrument of Instruction, the matter is entirely between him and the Crown which has appointed him and it can dismiss him as a last resort.

The 'individual judgement' of the Governor-General is ultimately the judgement of the Secretary of State, and the 'discretion' of the Governor-General becomes the 'discretion' of His Majesty's Government. The Governor-General may have arrived at a judgement, but if his decision is not in accord with that of the Secretary of State, he may be overruled and may have to act on such instruction as may be issued to him by the

[1] See W.P. Prop. 20; J.C.R. 152. See s. 292 below (Transitional Provision) and Introduction to this Chapter under POSITION OF THE GOVERNOR-GENERAL IN INDIA AND IN THE DOMINIONS.

[2] See s. 13(2).

Secretary of State. Theoretically, there is thus complete control exercised by the Secretary of State over that extensive sphere of the Governor-General's activities which are in his discretionary power or in which he is to be guided by his individual judgement.[1] But no doubt in practice, a convention of non-interference by the Secretary of State will gradually grow up, thus considerably enlarging the exercise of powers by the Governor-General. The section not merely contemplates restrictions on the authority of the Governor-General in certain matters, but also secures an effective voice of His Majesty's Government in the administration of the Federal Government.[2]

Financial adviser to Governor-General

15.—(1) The Governor-General may appoint a person to be his financial adviser.

(2) It shall be the duty of the Governor-General's financial adviser to assist by his advice the Governor-General in the discharge of his special responsibility for safeguarding the financial stability and credit of the Federal Government, and also to give advice to the federal Government upon any matter relating to finance with respect to which he may be consulted.

(3) The Governor-General's financial adviser shall hold office during the pleasure of the Governor-General, and the salary and allowances of the financial adviser and the numbers of his staff and their conditions of service shall be such as the Governor-General may determine.

(4) The powers of the Governor-General with respect to the appointment and dismissal of a financial adviser, and with respect to the determination of his salary and allowances and the numbers of his staff and their conditions of service, shall be exercised by him in his discretion :

Provided that, if the Governor-General has determined to appoint a financial adviser, he shall, before making any appointment other than the first appointment, consult his ministers as to the person to be selected.[3]

In order that assistance may be available to the Governor-General in the discharge of the special responsibility mentioned in s. 12(1) (*b*), the Governor-General is empowered by this section to appoint a financial adviser, without executive powers, whose services would also be available to the ministers, if they wish to consult him in regard to any financial matter. The appointment, pay, and conditions of service of the financial

[1] For list of such activities, see Part II, Chapter II, Introduction under MATTERS TO BE DEALT WITH AT THE GOVERNOR-GENERAL'S DISCRETION, and under MATTERS TO BE DEALT WITH IN THE GOVERNOR-GENERAL'S INDIVIDUAL JUDGEMENT.

[2] For CONTROL OVER THE GOVERNOR, see s. 54, below, and Part III, Chapter II, Introduction under RELATION BETWEEN GOVERNOR AND GOVERNOR-GENERAL. For transitory provisions re. control by the Secretary of State, see s. 314 below.

[3] See W.P. Intr. 31 ; W.P. Prop. 17 ; J.C.R. 170.

adviser and his staff are to be determined by the Governor-General in his discretion, but he shall consult the ministers before actually selecting the person. He will not be, however, bound by the advice of the ministers as regards selection.[1]

16.—(1) The Governor-General shall appoint a person, being a person qualified to be appointed a judge of the Federal Court, to be Advocate-General for the Federation. Advocate-General for Federation

(2) It shall be the duty of the Advocate-General to give advice to the Federal Government upon such legal matters, and to perform such other duties of a legal character, as may be referred or assigned to him by the Governor-General, and in the performance of his duties he shall have right of audience in all courts in British India and, in a case in which federal interests are concerned, in all courts in any Federated State.

(3) The Advocate-General shall hold office during the pleasure of the Governor-General, and shall receive such remuneration as the Governor-General may determine.

(4) In exercising his powers with respect to the appointment and dismissal of the Advocate-General and with respect to the determination of his remuneration, the Governor-General shall exercise his individual judgment.[2]

The Advocate-General of the Federation will hold office on a settled tenure during the pleasure of the Governor-General. The section secures the Federation legal advice from an officer who is not merely well qualified to tender such advice but is entirely free from political or party associations. The Joint Parliamentary Committee recommended [3] that the Constitution Act should require each provincial Governor to select *at his discretion* and appoint an Advocate-General holding office during pleasure. The recommendation, therefore, was that the Governor was not to consult the ministers at all but act as he thought fit.[4] But the recommendation of the Joint Parliamentary Committee has not been accepted, as under this section, the Governor-General (and the Governor under s. 55) is to consult the ministers regarding the appointment, dismissal, and remuneration of the Advocate-General, though he is not bound by their advice. This change is likely to hamper the freedom of the Governor-General, and it will be difficult for him not to be swayed by pressure from the ministers demanding an appointment based on political or communal considerations.

The salary of the Advocate-General is non-votable and is a charge on the revenues of the Federation.[5] The Advocate-General can attend and take part in the proceedings of either Chamber and of any committee of which he has been appointed member, but he cannot vote. He has all the privileges of a member of Legislature with this exception.[6]

[1] See notes to s. 12(1) (*b*) above.

[2] See J.C.R. 401 and s. 72D(3) (*iv*), old Act. [3] In par. 401.

[4] See s. 55 for appointment of the Advocate-General by the Governor.

[5] See s. 33(3) (*c*) below. [6] See s. 28(5) and notes to s. 21.

By paragraph 11 of the Government of India (Commencement and Transitory Provisions) Order, 1936, this section and s. 33(3) of the new Act came into force on 1 April 1937, the date of commencement of Part III.

Conduct of business of Federal Government

17.—(1) All executive action of the Federal Government shall be expressed to be taken in the name of the Governor-General.

(2) Orders and other instruments made and executed in the name of the Governor-General shall be authenticated in such manner as may be specified in rules to be made by the Governor-General, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor-General.

(3) The Governor-General shall make rules for the more convenient transaction of the business of the Federal Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor-General is by or under this Act required to act in his discretion.

(4) The rules shall include provisions requiring ministers and secretaries to Government to transmit to the Governor-General all such information with respect to the business of the Federal Government as may be specified in the rules, or as the Governor-General may otherwise require to be so transmitted, and in particular requiring a minister to bring to the notice of the Governor-General, and the appropriate secretary to bring to the notice of the minister concerned and of the Governor-General, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor-General.

(5) In the discharge of his functions under subsections (2), (3) and (4) of this section the Governor-General shall act in his discretion after consultation with his ministers.[1]

The section authorizes the Governor-General to make at his discretion any rules which he regards as requisite to regulate the disposal of Government business and the procedure to be observed in its conduct and for the transmission to himself of all such information as he may direct. The distribution and conduct of public business is to be regulated by rules made hereunder. This will ensure that all matters in the sphere of action of ministers are brought to his notice before action is taken upon them. The rules will lay down the relations between the Governor-General, his ministers and the secretaries to the Government. Where special responsibilities are involved or are likely to be involved, the rules

[1] See W.P. Prop. 6 and 16; J.C.R. 100.

will include provisions requiring ministers and secretaries to the Government to bring to the notice of the Governor-General and his minister any matters under consideration in their department, as recommended by the Joint Parliamentary Committee in paragraph 100 of their Report.[1]

Cl. (1) All executive acts in the Federation (and all executive acts in the Provinces) will run in the name of the Governor-General (or the Governor). It follows that where in this Act, the phrase 'Governor-General' (or the word 'Governor') is used, without the added words 'in his discretion', the federal (or the provincial) Government is meant.

Cl. (5) When the Governor-General consults his ministers, but acts as he thinks proper, he is said to act in his individual judgement. But when he is not bound to consult his ministers at all, but acts as he thinks proper without consulting them, he is said to act in his discretion. Here the two distinct ideas are mixed up; for other such examples, see ss. 15(4) and 59(5).

[1] See s. 59 below for conduct of business of the provincial Government.

CHAPTER III

THE FEDERAL LEGISLATURE

Introduction

The provisions of this chapter describe the structure of the Federal Legislature. The legislative authority, it is laid down, is vested in His Majesty represented by the Governor-General and the two houses of the legislature, called the Council of State (the Upper House) and the Federal Assembly (the Lower House). The Council of State is to consist of 260 members, while the Assembly is to be composed of 375 members. The Rulers of Federated Indian States will appoint 104 members to the Upper Chamber and 150 representatives to the Lower Chamber. The remaining seats in both the houses of the legislature will be filled up by the representatives of the British Indian Provinces in accordance with the provisions of the First Schedule to the Act. Besides, the Governor-General's counsellors and the Advocate-General will have the right to attend and take part in the proceedings of both the Council of State and the Federal Assembly, though not made members thereof.[1]

Composition of the two Houses

The representatives of British India in the Assembly will be elected by indirect election in provincial constituencies except in the case of the three seats reserved for commerce and industry and one labour seat, where the constituencies will be non-provincial.[2] The Act provides for a system of direct election for the Upper House and of indirect election for the Lower House. Election to the seats allotted to the Indian Christian, Anglo-Indian and European constituencies will be by voters voting in separate communal electoral colleges and all qualified voters who are not voters in one of these constituencies will be entitled to vote in a general constituency. Election to the seats reserved for the members of the depressed classes will be in accordance with the special arrangements provided in the Act. The special seats assigned to commerce and industry will be filled by election by Chambers of Commerce and other similar associations and the special seats assigned to landholders will be filled by election in special landholders' constituencies. Persons to fill the seats in the Federal Assembly allotted to a Governor's Province as general seats, Sikh seats or Mohammedan seats shall be chosen by electorates consisting of such of the members of the Legislative Assembly of the Province as hold therein general seats, Sikh seats or Mohammedan seats respectively, voting in the case of a general election in accordance with the principle of proportional representation by means of the single transferable vote.[3] No person shall be qualified to be chosen as a member of the Federal Assembly unless he is a British subject or the Ruler or a subject of an Indian State which has acceded to the Federation and is not less than twenty-five years of age (in the case of the Council of State, the member must be at least thirty years of age) and possesses such, if any, of the other qualifications specified in the First Schedule. Further

[1] See s. 21 and notes thereto.

[2] First Schedule, s. 16.

[3] See First Schedule to the Act.

disqualifications for membership of the Federal Legislature are set out in s. 26 of the Act.

The Council of State will be composed of 260 members, of whom 156 will be representatives of British India and 104 will be appointed by the Rulers of Indian States which have acceded to the Federation.

Allocation of seats

The following points regarding the allocation of seats may be noted : (1) The distribution of seats in the Council of State does not depend on population but upon the importance of each State or Province, and other considerations. Bombay with a population of 18 millions has 16 seats, as against Bengal's 20, with a population of 30 millions. Travancore with a population of 5 millions has only 2 seats, while Bhopal with a population of 7 lakhs or one-seventh of Travancore gets 2 seats, and Gwalior and Baroda with a population respectively of 3½ millions and 2½ millions get 3 seats each. Hyderabad with a population of 14 millions gets only 5 seats. (2) The seats in the Federal Assembly are not distributed on a population basis, and it is not easy to find any logical principle underlying the allocation of seats, either among the units of the Federation or among the various communities. If the division of seats among the British Indian representatives and the Indian State representatives had been based on population, the proportion should have been 3 to 1, the population respectively being 260 millions and 80 millions, whereas the proportion is 2 to 1. Europeans who number 134,000 out of 260 millions, or less than ·06 per cent. get 4·66 per cent. of the seats in the Upper House, and 5·6 per cent. of the seats in the Lower House. Non-Moslems with a total population of nearly 144 millions get 105 seats, while Moslems with a population of nearly 66½ millions, get 83 seats or one-third of the seats for British India. (3) The numerical proportion between the two Houses has been laid down in paragraphs 205 and 216 of the *Report of the Joint Parliamentary Committee* as 2 to 3 ; this secures an effective voice of the Upper House at a joint sitting, and at the same time provides that the will of the people in the last resort shall prevail.[1] It is provided in s. 308(2) of the new Act that it is not open to the Federal Legislature under its constituent powers to recommend any alterations in the Act varying the proportion between the number of seats in the Council of State and that in the Federal Assembly, or the proportion in either House between the number of seats allotted to British India and that allotted to the Indian States. (4) The women's seats in the Federal Assembly will be filled up by an Electoral College consisting of all the women members of the Legislative Assemblies of the Governor's Provinces on a non-communal basis. But of the nine women's seats in the Federal Assembly, at least two shall be held by Mohammedans and at least one by an Indian Christian. (5) Six out of the 156 seats reserved in the Council of State for British India are to be filled by persons chosen by the Governor-General in his discretion. Such nominated members are eligible for appointment as ministers. In his evidence before the Joint Select Committee, the Secretary of State, Sir Samuel Hoare, made the following observations :

> I think my main argument for a small number of nominated members of this kind is based upon the experience of other countries where it has been found useful to bring in, as ministers and members

[1] See s. 24 of the Australia Act which lays down that the number in the Lower House shall be double that of the Senate.

of the Second Chamber, those who would not be able to get there by the ordinary channel of election. We have here an opportunity of that kind in the House of Lords and I think it would be a wise act to have some such powers of that kind in the Indian constitution, to a limited extent. Secondly, to redress questions of balance that may need redressing.

But the Governor-General's choice is restricted to those who are otherwise qualified to be members of the Council of State.

The representatives of the States will be appointed by the Rulers of the States concerned. The allocation of seats among the States, in the case of the Council of State, takes account of the relative rank and importance of the State as indicated by the dynastic salute and other factors and in the case of the Assembly, is based in the main on population.[1]

It is for the Ruler of a State to decide how his representative is to be selected, and the system of appointment to the office of a State representative in the Federal Legislature must presumably ensure that the views of the Ruler's Government, which is responsible for the policy of the State, is to be faithfully represented in the Legislature by the State representative. Although the representatives of a State will be appointed by its Ruler, the Act does not require them to vacate their seats, if called upon to do so by the Ruler. A State representative is nominated and not elected, but holds his seat on precisely the same tenure as an elected representative from British India.[2] A State representative is a delegate except that the State cannot revoke the delegate's mandate or recall him or appoint another in his place unless he resigns. There is nothing in the Act to prevent the Ruler of a State himself representing the State in the Federal Legislature. The fact that the Princes are not disqualified from sitting in the Legislature shows that the Act does not limit the Ruler's right to control his State policy in the matter of the selection of representatives. A Government servant whose services are lent to a Federated State may be the State representative.[3]

Thus, in a constitutional sense, there will be two different types of representatives in every House of the Federal Legislature, those from British India and those from the Indian States. Representatives from British India will be elected, either directly as for the Upper Chamber or indirectly as for the Lower Chamber ; in both cases, they will have the normal latitude of personal opinion and discretion, characteristic of the elected member of a popular assembly. But the State representatives will be the accredited agents of individual State governments and will be present there on a mandate to give expression to State policy on the various federal questions that arise.

Although the main function of the two Chambers is purely legislative they are also a sovereign authority for controlling at any rate the ministerial sphere of the Federal Government. No doubt, the council of ministers will be appointed by the Governor-General in accordance with instructions contained in the Instrument of Instructions but the Legislature may control their acts. The ministers are responsible to the Legislature for the conduct of their administration. A ministry which forfeits its confidence may be compelled to resign. A valuable means of directing the attention of the Federal Government to the conduct of federal officers and to the effects of federal policy is afforded by the right of

[1] J.C.R. 208. [2] J.C.R. 210. [3] See s. 24(4) (*b*).

interpellation. But no question, whether original or supplementary, dealing with or bearing upon matters outside the range of federal subjects can be admitted in either House.[1]

Party system at the centre

In the Federation, certain departments will be conducted by the Governor-General with the advice of counsellors and the remaining departments by him with the advice of the ministers. So there will be dyarchy in the centre as pointed out in paragraphs 38 and 187 and 188 of the *Report of the Joint Parliamentary Committee.* This will militate against the growth of responsible government in the centre and also against the establishment of the party system, although joint deliberation between the reserved and the other departments will be encouraged by the Governor-General.

The presence in the Federal Legislature of representatives of Indian States will further accentuate the difficulties in the way of the formation of a party system. Each of these representatives will voice the policy of the State nominating him and in matters affecting the common interests of the Indian States, their representatives in the Federal Legislature will presumably vote together. The continental group system rather than the English party system will continue to be followed, as at present. There are multifarious interests, political, religious and economic, which make broad alignments on a two, or three, party system impossible. The separate interest of the States will add to the complexity. A prominent leader in the Legislature will cut across the party system and attract followers by his personal influence. For all these reasons, it is very likely that the group system will prevail in the Federal Legislature.

Second Chamber

In unitary constitutions, there are Second Chambers in a great many cases, but their utility has been called into question. Dealing with representative form of government, Marriott[2] maintains that 'the modern world has with a singular measure of unanimity decided in favour of two legislative chambers'. But no doubt most of the constitutions now in existence are the result, as regards the structure of the Legislature, of conscious imitation of the English Parliament. But the unicameral principle, as Marriott says, has not lacked advocates, but except at moments of revolutionary fervour, the principle has never been adopted by any of the great States of the modern world. A single-chambered legislature is likely to be despotic. Cromwell described the unicameral Rump Parliament as the 'horridest arbitrariness that ever existed on earth', and speaking on the proposal to revive the Second Chamber, he stated: 'By the proceedings of this Parliament, you see they stand in need of a check or balancing power'. As Marriott says[3]: 'It may be taken as generally agreed by theorists that the principle of bicameralism is essential to that balance of power in the polity which cannot be impaired save with evident danger to the efficacy of the governmental machine... If majorities must rule, minorities need protection, and for the protection of minorities, there is no more convenient guarantee than a strong second chamber.'

But whatever may be urged as to the necessity of a second chamber in unitary states, bicameralism appears to be an essential and inseparable attribute of federalism. There is no federal constitution in existence

[1] For LIMITS OF LEGISLATIVE POWER, see Part V.

[2] Vol. II, pp. 390 *et seq.*

[3] Vol. I, p. 402.

without a second chamber or a Senate. The second chambers have been, as a rule, deliberately constituted in such a way as to embody and emphasize the federal principle. Further, it is in the Senate or upper chamber in a federation that the federal idea is enshrined; and in that chamber is to be found the primary and effective guarantee for the preservation of this peculiar type of constitution.

A genuine federation as opposed to a confederation represents not only a union of states but also a union of citizens. It follows that while one of the two chambers should represent the aggregate of citizens, the other should represent the union of states. As Marriott remarks,[1] no device has yet occurred to the wit of man so well adopted as bicameralism to fulfil the essential purpose of emphasizing the union of states as distinguished from the union of peoples.

The arguments for and against a Second Chamber, with special reference to Provinces, have been summarized in the *Report of the Indian Franchise Committee* (the Lothian Committee) in paragraphs 383-4. Its advocates urge four main grounds: (1) Owing to the very wide extension of the franchise under the new constitution in India, and the illiteracy of the vast majority of voters, it is necessary to have a body which will be representative of experience and expert knowledge, to act as a stabilizing factor by being empowered to revise or delay legislation for a short period, without being a rival with the Lower House for power. (2) In most democracies of modern times there is a bicameral legislature; and experience seems to show that their existence has been a security against hasty legislation and abuse of power by the Lower House. (3) The services of men of ripe experience and ability, who owing to various reasons cannot stand for election to the Lower House, are made available to the state by becoming members of the Upper House. (4) It is better that the responsibility for acting as a brake on the Lower House should be normally exercised by a Second Chamber, than by the Governor, which is the alternative.

The arguments against the creation of a Second Chamber in the Provinces are (1) the weight of public opinion in India is against the proposal; (2) such a Chamber will impede measures for the benefit of the masses who have been neglected, and thus aggravate discontent; (3) a provincial Second Chamber will be expensive and superfluous as all interests will be adequately represented in the Lower House; (4) it will encourage the making of laws by a process of compromise and bargaining, provide opportunities for delay and obstruction, for legislative proposals will have to follow a circuitous route.

By s. 308, a Provincial Legislature has been given a special right to present an address to the Governor for submission to His Majesty and to Parliament, advocating the creation or abolition of the Second Chamber. Such a resolution should be passed not less than ten years after the introduction of provincial autonomy. But under s. 308(4), it is open to His Majesty, whether ten years have passed or not, whether an address has been presented by the Provincial Legislature or not, to make an amendment abolishing or establishing a Second Chamber.

Federal Legislature

The Federal Assembly will continue for five years and power has been reserved to the Governor-General in his discretion to dissolve the Assembly earlier.[2] The Upper Chamber has been constituted on a permanent basis and is not subject to dissolution. Its members will be elected

[1] Vol. I, p. 418.

[2] S. 18.

for nine years and one-third will retire and be replaced at the end of every third year. Special arrangements have therefore been made in the Act for the first nine-year period following on its first constitution.

Procedure

Each Chamber of the Legislature will elect its own Chairman and Deputy-Chairman[1] and possesses ample powers to regulate its own procedure and business.[2] But the power to summon and appoint places for the meeting of the Legislature and also the power of prorogation and dissolution of the Lower Chamber is vested in the Governor-General at his discretion.[3] The procedure and conduct of business in each House will be regulated by rules to be made, subject to the provisions of the Act, by each House; but the Governor-General has been empowered to make rules in his discretion after consultation with the Chairman of each House: (*a*) for regulating the procedure of, and the conduct of business in, the Chamber in relation to matters which affect the discharge of his functions, in so far as he is by this Act required to act in his discretion or to exercise his individual judgement; (*b*) for securing timely completion of the financial business; (*c*) prohibiting, save with the prior consent of the Governor-General given at his discretion, the discussion of, or the asking of question on, certain matters specified in s. 38.

In the event of conflict between a rule so made by the Governor-General and any rule made by either Chamber, the former will prevail and the latter to the extent of its inconsistency shall be void. The following matters connected with elections and electoral procedure, in so far as provision is not made by the Act, will be regulated by Order in Council: (i) the qualification of electors and of candidates; (ii) the delimitation of constituencies for purposes of elections; (iii) the conduct of elections; (iv) expenses of candidates; (v) corrupt and other election offences; (vi) decision of election disputes; (vii) the filling of casual vacancies[4] and (viii) other matters ancillary to the above.[5] In so far as provision regarding any matter is not made by the new Act or by Order in Council, or by the new Federal Legislature (in respect of matters it is competent to make laws), the Governor-General in his individual judgement is empowered to make rules for carrying into effect the provisions of the First Schedule and in particular, with respect to notification of vacancies, the nomination of candidates, the conduct of elections, the election expenses of candidates, corrupt practices and the decision of doubts and disputes in connexion with elections.[6] But until these matters are so dealt with, the existing laws will hold good.[7] Subject to the Rules and Standing Orders affecting the Chamber, there will be freedom of speech in both Chambers of the Federal Legislature. No person will be liable to any proceedings in any court by reason of his speech or vote in either Chamber or by reason of anything contained in any official report of the proceedings in either Chamber.

No Bill will become law until it has been agreed to by both Chambers either without amendment or with such amendments only as are agreed to by both Chambers and has been assented to by the Governor-General or in the case of a reserved Bill, until His Majesty in Council has signified his assent. The legislative authority of the Federation, subject to the

[1] S. 22. [2] S. 38. [3] S. 19.

[4] See Cl. 10 of Part I of First Schedule.

[5] See s. 291 and s. 308(4): for Orders in Council, see s. 309.

[6] See First Schedule, Rule 27.

[7] E.g. regarding corrupt practices—see ss. 292 and 293 below.

provisions of the Act, is vested in the Crown and the two Houses of the Legislature. The Governor-General has been empowered at his discretion, but subject to the provisions of the Act and to his Instrument of Instructions, to assent in His Majesty's name to a Bill which has been passed by both Chambers or to withhold his assent or to reserve the Bill for the signification of the King's pleasure. But before taking any of the courses, it will be open to the Governor-General to remit a Bill to the Chambers with a message requesting its reconsideration in whole or in part, together with such amendments, if any, as he may recommend. All Acts assented by the Governor-General will within twelve months be subject to disallowance by His Majesty.[1]

The Act contemplates two Houses with nearly co-equal powers.[2] The principal difference is in the sphere of finance. Although money Bills can only be introduced in the Lower House, the Upper House has powers to amend or reject them in the same way as the Lower House, and if in respect to any demand for grants the two Houses differ, the Governor-General shall summon a joint session of both Houses. All demands are to be considered first by the Lower House and the demands in the form voted by it (whether by way of rejection or reduction) are to be submitted to the Upper House. The Upper House has wide powers in relation to finance and can not only secure that a rejected or reduced grant is reconsidered at a joint session of the two Houses, but also refuse its assent to any Bill, clause or grant, which has been accepted by the Lower House. Thus the power of the Council of State in this connection is like the power of the Upper House in Australia and South Africa.

Although the Council of State has the power to assent or refuse to assent to a demand, or reduce any demand, a demand refused by the Assembly is not to be submitted to it unless the Governor-General so directs, and a demand reduced by the Assembly shall be submitted to the former only for the reduced amount unless the Governor-General otherwise directs.

The Act adopts the plan of resolving the differences between the two Houses by the decision of a majority of the two Houses sitting and voting together, as under the South Africa Act.

In the case of disagreement between the Chambers, the Governor-General has been empowered in any case in which a Bill passed by one Chamber has not, within six months thereafter, been passed by the other, either without amendment or with agreed amendments, to summon the two Chambers to meet in a joint sitting, for the purpose of reaching a decision on the Bill.[3] The members present at a joint session will deliberate and vote together upon the Bill in the form in which it finally left the Chambers in which it was introduced and upon amendments, if any, made therein by one Chamber and not agreed to by the other. Any such amendments which are affirmed by a majority of the total number of members voting at the joint session will be deemed to have been carried and if the Bill, with the amendments, if any, so carried, is affirmed by a majority of the members voting at the joint session, it shall be

[1] For Reservation and Disallowance of Bills in the case of the Dominions prior o, and after, the Statute of Westminster, see notes to s. 11 under DOMINIONS: RESERVATION AND DISALLOWANCE. For such relation in England, the United States, etc., see notes above under RELATION OF THE TWO HOUSES.

[2] J.C.R. 215.

[3] See old Act, s. 67(3) and old Indian Legislative Rules, 37–9.

taken to have been duly passed by both Chambers. It is entirely at the discretion of the Governor-General whether a Bill (other than a financial Bill) is to lapse by reason of the difference between the two Houses or is to be referred to a joint session. In the case of a money Bill or in cases where, in the Governor-General's opinion, a decision on the Bill cannot consistently with the responsibilities for any matters within his discretionary power or within the sphere of his individual judgement be deferred, the Governor-General has power in his discretion to summon a joint session and obtain a decision forthwith.[1] In the joint session, no member has any right to move amendments other than those which are relevant to the points of difference which are made necessary by the delay in the passage of the Bill, and the decision of the presiding officer as to the admissibility of any amendment is final and conclusive.[2]

The legislative work of the Federal Legislature is threefold:

(i) Ordinary legislation or public Bills; (ii) 'private' members' Bills; and (iii) financial Bills and Demands for Grants. Any member may, if he gets the chance, initiate legislation, although Bills introduced by private members, i.e. by members who hold no ministerial office, have a remote chance of being passed unless adopted by the Government. As regards procedure, there is no distinction between a Government Bill and a private member's Bill.

The procedure in regard to financial Bills and Demands for Grants is different from that for other Bills. The introduction of Bills relating to supplies for the Federal Executive or to taxation is the exclusive functions of the ministers. Unofficial members may move to reduce a vote but not to increase one; a recommendation of the Governor-General will be required for the introduction of any proposal in the Federal Assembly for the imposition of taxation, for appropriation of public revenues or for any proposal affecting the public debt or affecting or imposing any charge upon public revenues.[3] This represents the constitutional principle embodied in Standing Order 66 of the House of Commons, which finds a place in practically every Constitution Act, throughout the British Empire:

> This House will receive no petition for any sum relating to public service or proceed upon any motion for any grant or charge upon the public revenue, whether payable out of the consolidated fund or out of money to be provided by Parliament, unless recommended from the Crown.

The Governor-General will cause a statement of the estimated revenue and expenditure of the Federation, together with a statement of all proposals for the appropriation of those revenues, to be laid, in respect of every financial year, before both Chambers of the Legislature. The statement of proposals for appropriation will be so arranged as (*a*) to distinguish between those proposals which will, and those which will not, be submitted to the vote of the Legislature, and amongst the latter, to distinguish those which are in the nature of the standing charges, and (*b*) to specify separately those additional proposals (if any), whether under the votable or non-votable heads, which the Governor-General regards as necessary for the discharge of any of his special responsibilities.[4]

The proposals for the appropriation of revenues, other than proposals relating to the heads of expenditure enumerated in s. 33(3) and proposals

[1] See ss. 31 and 34.

[2] J.C.R. 150, 216.

[3] See ss. 34(4) and 37(1).

[4] See s. 33.

(if any) made by the Governor-General will be submitted in the form of Demands for Grants to the vote of the Assembly. The Assembly will be empowered to assent or to reduce the amount specified therein, whether by way of general reduction of the total amount of the demand or of the reduction or of omission of any specific item or items included in it. Proposals for appropriation of revenues, if they relate to the heads of expenditure mentioned in s. 33(3), will not be submitted to the vote of either Chamber (s. 34), but will be open to discussion in both Chambers, except in the case of the salary and allowances of the Governor-General and of expenditure required for the discharge of the functions of the Crown in, and arising out of, its relations with the Rulers of the Indian States.[1] The Governor-General has been empowered to decide finally and conclusively for all purposes, any question whether a particular item of expenditure does or does not fall under any of the heads referred to in s. 33(3). After the Legislature has discussed the budget as a whole and has voted upon those proposals for appropriation which are submitted to its vote, the Governor-General will be called upon to *authenticate* by his own signature the appropriations (s. 35). In authenticating those under the non-votable heads, he will be entitled to include in his authentication the sums additional to those proposed by his ministers under those heads which he originally included in the budget statement or if he thinks fit, reduced sums. He will be similarly required to authenticate the grants as voted by the Legislature and in so doing, he will be entitled, if he regards as necessary for the fulfilment of any of his 'special responsibilities', to include in his authentication any sums not in excess of those by which the Legislature may have reduced the grants submitted to it. By this procedure, the ministry on the one hand and the Legislature on the other, will be left free to exercise their respective responsibilities in the matter of supply—the ministers by accepting responsibility for proposals for appropriations so far as, and no further than, they are prepared to hold themselves responsible to the Legislature and the Legislature, by recording their agreement or disagreement with ministers' proposals; at the same time, the Governor-General, if he is unable to accept the proposals of his ministers or the decision of the Legislature, as consistent with the discharge of his special responsibilities, will be enabled to bring the resulting appropriations into accord with his own estimates of the requirements, and, if necessary, through his special legislative powers, to secure that the budget provides him with resources which will cover the appropriations which he finally authenticates. The procedure of authentication by the Governor-General serves a double purpose by securing first, that the audit authorities should be concerned only with a single document as authority for all appropriations of revenues by whatever legal procedure such appropriations have been made, and secondly, that the Governor-General does not make any appropriations under his special powers without the Legislature being made cognizant thereof.

Constitution of the Upper House

In England, the House of Lords is predominantly hereditary in composition, and unwieldy in bulk. There are about 670 adult Peers, entitled to sit in the House, besides 26 Spiritual Peers, 28 Representative Peers of Ireland, 16 Representative Peers of Scotland, and 5 Law Lords. In the United States, the Senate is based upon the root principle of the absolute equality of States. The States, big and small, have equal

[1] W.P. Prop. 98.

representation in the Senate, and no State, under the constitution, can be, without its consent, deprived of its equal suffrage. The Senate consists of 96 members, two from each State, who are since the amendment in 1912 to be directly elected by the people of the State for six years (and not indirectly elected through state legislatures as originally provided). One-third of the Senate is to retire every two years. Thus there is a continuous existence of the Senators. Senators change, but the Senate is permanent. The same principle of equality of representation is adopted in the Upper House of the Federal Republic of Switzerland, and also in the Senate in Australia. The Senate consists of 36 members, six from each State. It is in perpetual existence and cannot be dissolved except in the event of a constitutional deadlock. The Senators are elected for six years, one-half of them retiring every three years. The Senators are directly elected by the people, the electors being the same for both Chambers. The Canadian Constitution is of a more unitary type than that of the United States or Australia, and the federal idea is not completely embodied in the Senate of Canada. It consists of 87 members nominated for life by the Governor-General. The number of Senators is divided among the several provinces in the Dominion according to a scale prescribed by statute. Originally the idea of federal equality was observed, but subsequently this principle was not maintained. In the Union of South Africa the goal of the constitution adopted in 1909 was the unitary principle—not a federal, but a united South Africa. For the first ten years, the Senate was to consist of eight members nominated for ten years by the Governor-General in Council, and eight others elected by the four original provinces, for ten years in a joint session of the two houses of the legislature on the principle of proportional representation. At the expiry of ten years, the South African Parliament might leave things as they are, or might provide for the constitution of the Senate in any manner it thought fit. No change has been made.

Relation between the two Houses

The respective numbers of members of the two Chambers in a federation is so fixed that in case of joint session, the will of the Lower House will prevail.[1] In England, Bills (except money Bills) may be introduced in either House, and important Bills which do not raise acute political controversy are frequently introduced in the House of Lords. When passed in one House, it is sent to the other and in case of difference between the two Houses, a conference (a formal meeting of members appointed by each House, known as 'Managers') might be held; but now it is usual for a committee of the House which was disagreeing, to send to the other House a statement of their reasons with the amended Bills and a settlement generally by informal conferences between the party leaders. Financial Bills—i.e. Bills containing provisions relating to the imposition and application of taxes, can only originate in the House of Commons. Such Bills cannot be amended in the Upper House. The power of the House of Commons was placed on a statutory basis by the Parliament Act, 1911.[2]

Parliament Act, 1911

This Act takes away all legislative powers from the House of Lords in respect of any money Bill. A money Bill is defined in s. 1(2) of the Act as a public Bill which, in the opinion of the Speaker of the House of Commons, contains only provisions for the imposition, repeal, alteration,

1 See s. 24, Australia Act and J.C.R. 216.

2 1 & 2 Geo. 5, c. 13.

remission or regulation of taxation, and the imposition of charge on the Consolidated Fund for financial purposes, etc. If a money Bill which has endorsed on it a certificate to the above effect from the Speaker, when passed by the Commons and sent up to the House of Lords, is not passed as it is, by the Upper House, it is to be presented with the Speaker's certificate to His Majesty for assent and becomes an Act of Parliament on such assent though the House of Lords has not consented to the Bill. In respect of other public Bills, the Parliament Act takes away from the House of Lords any *final* veto but gives to it a *suspensive* veto which may, under certain conditions, be removed and the Bill made law without its consent after two years and a month. So the effect of the Parliament Act is to give to the House of Commons the power of passing any Bill whatever, if the conditions of s. 2 are complied with.

In the United States, the legislative authority of the Senate is, except as regards finance, co-ordinate with that of the House of Representatives. Any Bill (except one to raise revenue) may originate in either House, and owing to the fact that in America the Executive does not, as in England, dominate the Legislature, the Senate takes its fair share in initiating legislation. Finance Bills must, however, originate in the Lower House, the Senate enjoying and exercising the same powers of amendment and rejection as in the case of other Bills. In the event of disagreement between the two Houses, a conference committee composed of members of both Houses is appointed by the President of the Senate and the Speaker of the House. This committee's report is generally accepted by both Houses. The Bill when passed in identical form by both the Houses is sent for approval to the President who has the right to return it unsigned to the Congress. If the Bill is again passed by a majority of two-thirds in both Houses, the President's veto lapses and it becomes law with or without his assent.

In Australia, the Senate has (except as regards finance) equal power with the House of Representatives in respect of all proposed laws. Money Bills must originate in the Lower House. The Senate may reject, but may not amend, them and it may at any stage return to the Lower House any proposed law which the Senate may not amend, requesting certain amendments to be made, and the Lower House may make such amendments with or without modifications. The constitution makes strict provisions against 'tacking' and against the introduction of any alien substance into a finance Bill.[1] Thus the Senate in Australia has a recognized power of money Bills beyond that of any other Second Chamber in the British Dominions. An original and ingenious means was devised by s. 57 of the Australia Act for the solution of deadlocks between the two Houses. If the Lower House passed any Bill and the Senate rejects it or passes it with unacceptable amendments and if after three months, whether in the same or in the next session, the Lower House again passes the Bill with or without any amendments as suggested by the Senate, and the Senate a second time rejects it or passes it with amendments not agreed to by the Lower House, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. If after dissolution, the new House of Representatives again passes the Bill with or without any amendments made or suggested by the Senate, and the Senate rejects or fails to pass it in a manner agreed to by the House of Representatives, the Governor-General may convene a *joint sitting* of both Houses. The members present shall vote together on

[1] Ss. 52-53 of the Australia Act

the Bill as last proposed by the House of Representatives and on the amendments proposed by one House and not agreed to by the other, and the Bill as passed by an absolute majority of the total number of members of both the Houses shall be taken to have been duly passed by both Houses and shall be presented to the Governor-General for the Queen's assent. The device of joint sitting was adopted from the Norwegian system in which the two Chambers meet as one for the purpose of composing their differences. In Australia, on any Bill, whether dealing with finance or not, the Senate by disagreeing with the Lower House can force a dissolution; and the House of Representatives cannot override the will of the Senate until after an appeal to the electorate, and then only if the will of the electors is declared with emphasis. So it may be said that the Australian Senate is the most powerful Second Chamber in the British Dominions. To provide that the will of the people shall in the last resort prevail against the will of the States as represented in the Senate, it is laid down in s. 24 of the Australia Act that the number of the members of the Lower House shall be double that of the Senators.

In Canada the powers of the two Houses are co-ordinate, except that money Bills on the recommendation of the Executive originate in the Lower House. There is no direct provision in the Canada Act for prevention of deadlocks between the two Houses, but power is given to the Crown to nominate three or six additional Senators, but this power has never been exercised by the Crown.

In South Africa, the Senate, like the Australian Senate, can reject but cannot amend, a money Bill which must originate in the House of Assembly. As regards all Bills, whether financial or not, the Senate only possess a suspensive veto. For preventing deadlocks, it is provided that if an ordinary Bill is passed by the House of Assembly in two successive sessions and is twice rejected by the Senate or passed by it with amendments not agreed to by the House of Assembly, the Governor-General may during the second session convene a joint sitting. The Bill, if passed by a simple majority of the members of both Houses, shall be deemed to have been duly passed by Parliament and may be presented for Royal Assent. In the case of money Bills, the joint sitting may be convened during the *same session* in which the Senate first rejects or fails to pass the Bill. The difference in the solution for a deadlock in South Africa and that in Australia lies in the fact that in the latter case, there is appeal to the electorate, whereas in the Africa Act, there is no such provision. It will be noticed that the provisions of the Africa Act for the solution of a deadlock have been followed in s. 31 of the Government of India Act, 1935.

Relation of the two Houses in the Federal Legislature

The two Chambers of the Federal Legislature have equal powers regarding all Bills (except money Bills), which may originate in either Chamber.[1] Money Bills, however, must originate in the Lower House.[2] The annual financial statement, with the estimates of expenditure embodied therein, has to be laid before both the Chambers. The votable estimates of expenditure are first to be submitted, in the form of demands for grants, to the Federal Assembly, and then to the Council of State; and either Chamber has the power to refuse or reduce a demand for grant.[3] If the two Chambers differ in respect to any demand, there is to be a joint

[1] S. 30. [2] S. 37. [3] S. 34(2).

sitting. As stated in paragraph 215 of the Report of the Joint Parliamentary Committee, it is intended that the powers of each House in relation to any demand should be identical, any difference of opinion being resolved at a joint sitting.

Relation of the two Houses in the Provincial Legislature

The principle governing the relation of the two Provincial Houses (where there are two) is that both in respect of financial powers and generally, the Upper House—the Legislative Council—should not be regarded in any sense as a body having co-equal powers with the Provincial Legislative Assembly, but rather as a body with powers of revision and delay for the purpose of exercising a check upon hasty and ill-considered legislation, as pointed out in paragraph 150 of the Report of the Joint Parliamentary Committee. Further, a Bill introduced in the Legislative Council but rejected in the Legislative Assembly is to lapse, the machinery of a joint sitting being confined to the converse case. Again, though the annual financial statement is, under s. 78, to be laid before both Houses, the demands for grants are to be submitted to the vote of the Legislative Assembly only, the Upper House not having the power enjoyed by the Council of State in this respect under s. 34(2). A joint sitting, therefore, in respect of money Bills cannot take place in the Provincial Legislature, as the Lower House has exclusive power in respect thereto. As in the case of the Federal Legislature, so in the case of the Provincial Legislature, it is provided by s. 82 that financial Bills are only to originate in the Lower House.

A financial Bill under s. 37, not being the annual financial statement, and not involving any of the Governor-General's special responsibilities, if defeated in the Federal Assembly, cannot, it seems, be re-introduced in the Upper House.

Privileges of the Indian Legislature

The privileges of the Indian Legislature are such as are conferred by the statute itself or rules made thereunder. Subject to the provisions of this Act, the privileges would be such as the Legislature assigns to itself. The Privy Council has laid down that the privileges of the British Parliament are essentially peculiar to itself, being the product of long usage, and they are not carried over to any Legislature by its merely performing similar functions in legislative matters, and that a Legislature has only the rights of every Assembly to secure order in its own proceedings. In *Kielly* v. *Carson*,[1] it was held that the Newfoundland Assembly had no right to order an arrest for a contempt committed out of doors, and in *Doyle* v. *Falcomer*,[2] it was ruled that even a representative Assembly could not punish for contempt committed before it, because it had only the power to remove the obstacle, but not to punish the offender.

It is doubtful if the Legislature can remove or suspend a member for an indefinite period, e.g. until he apologizes. In *Barton* v. *Taylor*,[3] the Privy Council held that a Colonial Assembly might have the power to suspend but not indefinitely, nor for a definite period resting on the irresponsible decision of the Assembly.[4] But in *Harnett* v. *Crick*,[5] the Privy Council ruled that the Assembly could pass a special order under which a member was suspended pending judicial investigation of his

1 4 Moo. P.C. 63.

2 4 Moo. P.C. (N.S.) 203.

3 (1886) 11 App. Cas. 197.

4 See also *Fenton* v. *Hampton*, 11 Moo. P.C. 347.

5 [1908], A.C. 470.

conduct. It is doubtful if either House enjoys the absolute right to exclude a member. In *Bradlaugh* v. *Gossett*,[1] the plaintiff complained that being a duly elected member, the House, by passing a Resolution, excluding him from the House, had prevented him from taking the oath, and had caused him to be ejected from the House. He asked for a declaration that the order of the House was void, and for other reliefs. The court held that 'the House of Commons has the exclusive power of interpreting the statute so far as the regulation of its own proceedings was concerned; and even if that interpretation should be erroneous, the court has no power to interfere with it directly or indirectly'. Each House of Parliament is the guardian of its own privileges, and claims to be the sole judge of any matter which may arise, which in any way infringe upon them, and if it deems advisable, to punish either by way of imprisonment or reprimand, any person whom it considers guilty of contempt. But neither Chamber of the Indian or Provincial Legislature possesses such powers as are enjoyed by the 'High Court of Parliament'. Neither Chamber has the right of committing for contempt persons refusing to give evidence before committees of the Chamber, but legislation may be passed authorizing the courts to inflict penalties on a person convicted of refusing to give evidence or to produce papers. But the Governor-General in his individual judgement may make rules safeguarding confidential matters from disclosure and regulating the attendance of persons who have been civil servants. The Bengal Legislative Council (Witnesses) Act, 1866—Ben. Act III of 1866—authorized the Governor of Bengal to summon any person to appear before the Legislative Council or to produce papers required by him; and on failure, the person may be punished by the Governor with imprisonment. By the Government of India (Adaptation of Indian Laws) Order, 1937, Fourth Schedule, this Act has ceased to have effect, although it has not yet been formally repealed.

Privileges enjoyed by the former legislatures are continued. By the Legislative Members' Exemption Act—Act XXIII of 1925—freedom from services as juror or assessor and from civil imprisonment during the session are ensured. No Act, however, may confer on either Chamber or any of its officers the status of a court or any punitive powers other than that of excluding persons infringing the rules or standing orders or behaving in a disorderly manner.

Freedom of discussion

The rules of procedure to be framed under s. 38 are to forbid discussion or questions on any matter connected with a State outside the federal sphere (unless the Governor-General thinks that federal interests are involved and permits discussion); they will also forbid discussion or questions in respect of (*a*) the relations of the Crown or the Governor-General and any foreign power or state; (*b*) matters connected with tribal or excluded areas (unless in relation to the budget); (*c*) the action of the Governor-General in relation to provincial affairs; and (*d*) the personal conduct of the Ruler of a State or member of his family. Freedom of discussion of any Bill or clause or amendment may also be prevented if the Governor-General certifies in his discretion that such discussion would affect his special responsibility for preserving the peace and tranquillity of India.[2] The conduct of a judge of the Federal Court or of the High Court in the discharge of his duties is not to be discussed. In England, by a convention of the constitution, the conduct

[1] (1884) 12 Q.B.D. 271. [2] See ss. 40 and 86.

of a judge of the High Court cannot be called into question in Parliament, by question or by way of amendment in debate, unless the discussion is based on a substantive motion in proper terms.[1]

Freedom of speech

In England, words spoken in Parliament by a member of either House are absolutely privileged and no Court has any jurisdiction to entertain any action with respect of them. The member speaking in Parliament is not amenable to the civil or the criminal law, though the statement may be false to his knowledge, and is made maliciously. But this privilege does not extend to a statement published by the member outside the House, though it is a reproduction of his speech in the House. Thus speech within the walls of the Legislature is unquestioned and free. But this freedom must be understood to apply only to external influence or interference, and does not mean unrestrained license of speech in the House. The House controls the action of the members and enforces this control by censure, suspension, commitment and expulsion.[2] Under Rule 17 of the old Indian Legislative Rules and of the rules for the Governor's Legislative Council, the President is to preserve order and has all necessary powers for enforcing his decision; he may direct a member guilty in his opinion of gross disorderly conduct to withdraw at once and such member shall immediately withdraw, and shall be absent for the remainder of the day's meeting. If the member is for the second time in the same session directed to withdraw, the President may order him to absent himself from the Chamber for any period up to the close of that session. It was further provided by the rules that a member, while speaking, must not refer to a matter which is *sub-judice*, make a personal charge against another member, reflect upon the conduct of His Majesty, the Governor-General, Governor, or any Court of justice; or utter treasonable, seditious or defamatory words, or use his right of speech for the purpose of wilfully obstructing the business of the Chamber.

Publication

Persons, who publish under the direct authority of either House in England the proceedings in that House, have a statutory protection; and persons who, though not directly so authorized, publish a correct copy of the proceedings enjoy a somewhat similar protection.[3] At Common Law a fair and accurate report of Parliamentary proceedings enjoys an immunity similar to that given to a fair and accurate report of proceedings in a Court of justice. S. 28(1) of the new Act provides for immunity of a person for publication of the proceedings in the Legislature by the authority of either Chamber.

General.

Constitution of the Federal Legislature

18.—(1) There shall be a Federal Legislature which shall consist of His Majesty, represented by the Governor-General, and two Chambers, to be known respectively as the Council of State and the House of Assembly (in this Act referred to as 'the Federal Assembly').

[1] See Law Journal, June 2, 1906, at p. 373 on *Parliament and the Bench.*
[2] See May, 10th ed., ch. xii.
[3] See the Parliamentary Papers Act, 1840—3 & 4 Vict., c. 9, ss. 1–3.

(2) The Council of State shall consist of one hundred and fifty-six representatives of British India and not more than one hundred and four representatives of the Indian States, and the Federal Assembly shall consist of two hundred and fifty representatives of British India and not more than one hundred and twenty-five representatives of the Indian States.

(3) The said representatives shall be chosen in accordance with the provisions in that behalf contained in the First Schedule to this Act.

(4) The Council of State shall be a permanent body not subject to dissolution, but as near as may be one-third of the members thereof shall retire in every third year in accordance with the provisions in that behalf contained in the said First Schedule.

(5) Every Federal Assembly, unless sooner dissolved, shall continue for five years from the date appointed for their first meeting and no longer, and the expiration of the said period of five years shall operate as a dissolution of the Assembly.

The Federal Legislature is to consist of His Majesty and the two Houses. This is on the analogy of the British legislature and Dominion legislatures. In Canada, the Parliament consists of the King, a Senate and a House of Commons. In Australia, the federal Parliament consists of the King (represented by the Governor-General), a Senate and a House of Representatives. In South Africa, the Parliament consists of the King, a Senate and a House of Assembly.[1]

Council of State

As in the Upper Chamber in the United States and in the Australian Commonwealth, it has now a permanent existence. See Introduction to this Chapter under CONSTITUTION OF THE UPPER HOUSE. See First Schedule, Rules 13–16.

Federal Assembly

The Governor-General has the power of dissolution.[2] In the ordinary course, by efflux of time, there is automatic dissolution. The life of the Assembly was previously three years only. It is not open now to the Governor-General to extend the term as he could have under s. 63D(1), Prov. (*b*), old Act.

His Majesty's Proclamation establishing the Federation will be issued under s. 5(1) above. See s. 477(1) for the commencement of Part II of this Act. By Order in Council, the 1st April 1937 was the date fixed.

Sessions of the Legislature, prorogation and dissolution

19.—(1) The Chambers of the Federal Legislature shall be summoned to meet once at least in every year, and twelve months shall not intervene between their last sitting

[1] See Introduction to this Chapter under RELATION BETWEEN THE TWO HOUSES IN THE FEDERAL LEGISLATURE.

[2] See s. 19(2) (*c*).

in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of this section, the Governor-General may in his discretion from time to time—

(a) summon the Chambers or either Chamber to meet at such time and place as he thinks fit;
(b) prorogue the Chambers;
(c) dissolve the Federal Assembly.

(3) The Chambers shall be summoned to meet for their first session on a day not later than such day as may be specified in that behalf in His Majesty's Proclamation establishing the Federation.[1]

In his discretion: See Part II, Chapter II, Introduction under this heading.
His Majesty's Proclamation: See s. 5 and notes thereunder.

Right of Governor-General to address, and send messages to, Chambers

20.—(1) The Governor-General may in his discretion address either Chamber of the Federal Legislature or both Chambers assembled together, and for that purpose require the attendance of members.

(2) The Governor-General may in his discretion send messages to either Chamber of the Federal Legislature, whether with respect to a Bill then pending in the Legislature or otherwise, and a Chamber to whom any message is so sent shall with all convenient dispatch consider any matter which they are required by the message to take into consideration.

Right to address: See old ss. 63A(3) and 63B(3).

Rights of ministers, counsellors and Advocate-General as respects Chambers

21. Every minister, every counsellor and the Advocate-General shall have the right to speak in, and otherwise to take part in the proceedings of, either Chamber, any joint sitting of the Chambers, and any committee of the Legislature of which he may be named a member, but shall not by virtue of this section be entitled to vote.

Ministers: For appointment and functions, see ss. 9-10.
Advocate-General: For appointment and functions, see s. 16. This is a new officer specially appointed for the Federation.[2] The Advocate-General, *ex-officio*, has, under s. 21 (federal) and s. 64 (provincial), a

[1] See W.P. Intr. 33(a); W.P. Prop. 23; old Act, s. 63D(2).
[2] See notes to s. 16 above.

right to speak in, and otherwise take part in the proceedings of, either Chamber, or any joint sitting of both Chambers or of any committee of that particular Chamber of which he has been made member, even though he may not be member of that committee. This provision was not in the Bill as introduced in the House of Commons. The effect of the change is that he is now to be a party nominee, and may not be free from political or party associations. The Joint Parliamentary Committee in paragraph 401 of their Report stated:

> It is no part of our intention to suggest that the office of Advocate-General should, like that of the law officers here, have a political side to it; indeed our main object is to secure for the provincial Governments legal advice from an officer, not merely well qualified to tender such advice but entirely free from the trammels of political or party associations, whose salary would not be votable and who would retain his appointment for a recognized period of years irrespective of the political fortunes of the Government or Governments with which he may be associated during his tenure of office.

The principle here laid down has been departed from. The Advocate-General will be appointed by the Governor-General or the Governor, not in his discretion, as originally recommended by the Joint Committee, but by him in his individual judgement, after consulting his ministers—see notes to s. 16 above. As he is to take part in politics as mouthpiece of the party in power, his will tend to be a political appointment, and it will be possible for the party to give him a very long term of appointment.

The Advocate-General or a counsellor enjoys all the rights of a member of the Federal Legislature, except that he cannot vote. Under s. 28(5) he has all the privileges of a member of the House conferred by s. 28(1) and (2). The rights of a minister in a Chamber of which he is not member are similar. In the Provincial Legislature, the minister and the Advocate-General enjoy the same rights.[1]

It will be noticed that the Advocate-General and the counsellors hold an office of profit. Under s. 26(1) (*a*), a person is disqualified from being either chosen as, or for being, member of either Chamber if he holds any office of profit. Under the old law, the Advocate-General, being not a whole-time officer of Government, was not regarded as an official; but under the new Act, a question may arise whether he (or a counsellor) comes under disqualification for being member, as holding an office of profit; if so, unless an Act is passed by the Federal or a Provincial Legislature, under s. 26(1)(*a*), or s. 69(1)(*a*), declaring that he is not so disqualified, he can neither be nominated, or elected, member of the Legislature. Does the specific mention in s. 21 of his being named member of either Chamber take him out of the application of the general disqualification mentioned in s. 26(1)(*a*)? Strictly speaking, he is not a member of the Legislature, as he has no right to vote; and s. 28(5) would appear to draw a distinction between him and a member of the Legislature. So it would seem that, though s. 21 speaks of his being named member, he is not really a member of the Legislature, and so he cannot come under disqualification as holder of an office of profit under s. 26(1)(*a*). See notes under ss. 26 and 307.

Counsellor: For appointment and functions, see s. 11(2).

[1] See ss. 64 and 71(5).

Officers of Chambers

22.—(1) The Council of State shall as soon as may be choose two members of the Council to be respectively President and Deputy-President thereof and, so often as the office of President or Deputy-President becomes vacant, the Council shall choose another member to be President or Deputy-President, as the case may be.

(2) A member holding office as President or Deputy-President of the Council of State shall vacate his office if he ceases to be a member of the Council, may at any time resign his office by writing under his hand addressed to the Governor-General, and may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council; but no resolution for the purpose of this subsection shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

(3) While the office of President is vacant, the duties of the office shall be performed by the Deputy-President, or, if the office of Deputy-President is also vacant, by such member of the Council as the Governor-General may in his discretion appoint for the purpose, and during any absence of the President from any sitting of the Council the Deputy-President or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as President.

(4) There shall be paid to the President and the Deputy-President of the Council of State such salaries as may be respectively fixed by Act of the Federal Legislature, and, until provision in that behalf is so made, such salaries as the Governor-General may determine.

(5) The foregoing provisions of this section shall apply in relation to the Federal Assembly as they apply in relation to the Council of State with the substitution of the titles 'Speaker' and 'Deputy-Speaker' for the titles 'President' and 'Deputy-President' respectively, and with the substitution of references to the Assembly for references to the Council:

Provided that, without prejudice to the provisions of subsection (2) of this section as applied by this subsection, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution.

Under old s. 63A(1), the Governor-General had the power to appoint from among its members a President and other persons to pre-

side over the meetings of the Council of State. Under subsection (1) of this section, the Council of State can elect its President and Deputy-President from among its members. Under old s. 63C(1), after four years from the first meeting of the Assembly (during which period the President will be appointed), the President and the Deputy-President of the Assembly are to be elected by the members from among themselves, and approved by the Governor-General. They may be removed from office by a vote of the Assembly with the concurrence of the Governor-General. By subsection (2) of this section, the President and the Deputy-President of the Council of State (as also the Speaker and the Deputy-Speaker of the Federal Assembly) may be removed after fourteen days' notice of resolution by the vote of a majority of all the members (not merely a majority of those present and voting). Neither the appointment nor the removal of the President or the Deputy-President (the Speaker or the Deputy-Speaker in the case of the Assembly) now requires the approval of the Governor-General. These officials, who will presumably be paid, are appointed by the Council of State, and so they are not holders of an office of profit under s. 26(1)(*a*). See notes under that section.

23.—(1) Save as provided in the last preceding section, all questions at any sitting or joint sitting of the Chambers shall be determined by a majority of votes of the members present and voting, other than the President or Speaker or person acting as such.

Voting in Chambers, power of Chambers to act notwithstanding vacancies, and quorum

The President or Speaker or person acting as such shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) A Chamber of the Federal Legislature shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the Legislature shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.

(3) If at any time during a meeting of a Chamber less than one-sixth of the total number of members of the Chamber are present, it shall be the duty of the President or Speaker or person acting as such either to adjourn the Chamber, or to suspend the meeting until at least one-sixth of the members are present.[1]

Cl. (2): Doubt was expressed in *Strickland* v. *Grima* [2] as to whether an Act is invalid because it was passed by persons not duly elected. This subsection validates the proceedings even though some unqualified persons may have voted.

Cl. (3): Any formal Act done by the Legislature when there is no quorum will be invalid.

1 See Introduction to this Chapter under PROCEDURE, and old s. 63D(4) and (5). For Provincial Legislature, see s. 66.

2 [1930] A.C. 285.

Provisions as to Members of Legislature

Oath of members

24. Every member of either Chamber shall, before taking his seat, make and subscribe before the Governor-General, or some person appointed by him, an oath according to that one of the forms set out in the Fourth Schedule to this Act which the member accepts as appropriate in his case.[1]

Vacation of seats

25.—(1) No person shall be a member of both Chambers, and rules made by the Governor-General exercising his individual judgment shall provide for the vacation by a person who is chosen a member of both Chambers of his seat in one Chamber or the other.

(2) If a member of either Chamber—

(*a*) becomes subject to any of the disqualifications mentioned in subsection (1) of the next succeeding section; or

(*b*) by writing under his hand addressed to the Governor-General resigns his seat,

his seat shall thereupon become vacant.

(3) If for sixty days a member of either Chamber is without permission of the Chamber absent from all meetings thereof, the Chamber may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the Chamber is prorogued, or is adjourned for more than four consecutive days.[2]

Disqualifications for membership

26.—(1) A person shall be disqualified for being chosen as, and for being, a member of either Chamber—

(*a*) if he holds any office of profit under the Crown in India, other than an office declared by Act of the Federal Legislature not to disqualify its holder;

(*b*) if he is of unsound mind and stands so declared by a competent court;

(*c*) if he is an undischarged insolvent;

(*d*) if, whether before or after the establishment of the Federation, he has been convicted, or has, in proceedings for questioning the validity or

[1] See old Legislative Assembly Electoral Rule 24: W.P. Prop. 23. For Provincial Legislature, see s. 67.

[2] See old Act, s. 63E.

regularity of an election, been found to have been guilty, of any offence or corrupt or illegal practice relating to elections which has been declared by Order in Council or by an Act of the Federal Legislature to be an offence or practice entailing disqualification for membership of the Legislature, unless such period has elapsed as may be specified in that behalf by the provisions of that Order or Act;

(*e*) if, whether before or after the establishment of the Federation, he has been convicted of any other offence by a Court in British India or in a State which is a Federated State and sentenced to transportation or to imprisonment for not less than two years, unless a period of five years, or such less period as the Governor-General, acting in his discretion, may allow in any particular case, has elapsed since his release;

(*f*) if, having been nominated as a candidate for the Federal or any Provincial Legislature or having acted as an election agent of any person so nominated, he has failed to lodge a return of election expenses within the time and in the manner required by any Order in Council made under this Act or by any Act of the Federal or the Provincial Legislature, unless five years have elapsed from the date by which the return ought to have been lodged or the Governor-General, acting in his discretion, has removed the disqualification:

Provided that a disqualification under paragraph (*f*) of this subsection shall not take effect until the expiration of one month from the date by which the return ought to have been lodged or of such longer period as the Governor-General, acting in his discretion, may in any particular case allow.

(2) A person shall not be capable of being chosen a member of either Chamber while he is serving a sentence of transportation or of imprisonment for a criminal offence.

(3) Where a person who, by virtue of a conviction or a conviction and a sentence, becomes disqualified by virtue of paragraph (*d*) or paragraph (*e*) of subsection (1) of this section is at the date of the disqualification a member of

the Legislature, his seat shall, notwithstanding anything in this or the last preceding section, not become vacant by reason of the disqualification until three months have elapsed from the date thereof or, if within those three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of, but during any period during which his membership is preserved by this subsection he shall not sit or vote.

(4) For the purposes of this section a person shall not be deemed to hold an office of profit under the Crown in India by reason only that—

(*a*) he is a minister either for the Federation or for a Province; or

(*b*) while serving a State, he remains a member of one of the services of the Crown in India and retains all or any of his rights as such.

In England, the chief disqualifications preventing a person from being elected as a member of the House of Commons are being (1) an alien; (2) an infant; (3) a lunatic; (4) a clergyman; (5) one holding pensions at the pleasure of the Crown, other than holders of civil and military service and diplomatic pensions; (6) a bankrupt (this disqualification lasting for five years after discharge unless there is a certificate that the bankruptcy was not caused by the bankrupt's misconduct); under Cl. (1) (*c*) of the section, the disqualification only lasts till the bankrupt has obtained his discharge; (7) a person guilty of corrupt practices contrary to the Corrupt and Illegal Practices Act, 1883; (8) a person convicted of treason or felony and sentenced to penal servitude or imprisonment with hard labour or for more than twelve months, unless he has completed his term of imprisonment or been pardoned; the Indian law under Cl. (1) (*e*) is much more stringent; the disqualification continues for five years after release unless the period is shortened by the Governor-General. Cl. (2) of this section reproduces the English law; (9) a person holding or undertaking certain contracts or commission for, or on account of, the public service[1]; and (10) a person holding certain offices under the Crown.[2] Navy office-holders are expressly excluded from membership of the House of Commons by various statutes. By the Act of Settlement of 1701, a person holding *any office of profit* under the Crown was declared incapable of being elected to the Commons; but this provision would have excluded ministers from the House and would have prevented the development of the Cabinet system, and so was repealed at once. An Act passed in 1707 in the reign of Queen Anne disqualified from election persons accepting any 'new' office created after 1705. The acceptance of an 'old' office (created before 1705) unless a statutory disqualification was expressly attached to such office, though annulling the election, left him eligible for re-election and thus arose the practice of ministers seeking re-election on acceptance of

[1] See *Re Sir Stuart Samuel*, [1913] A.C. 514.
[2] Cf. Cl. (1) (*a*) of this section.

office. By the Re-election of Ministers Act, 1926, the necessity for re-election was abolished, and so the provision of the Act of 1707 relating to the necessity for re-election on acceptance of an 'old' office was repealed. Many 'new' offices have been expressly excluded from the Act of 1707.[1]

Office of profit

The phrase 'office of profit' is new. It is taken from the Act of Settlement of 1701 where it was enacted that no person holding an office of profit under the Crown was capable of being elected as member of the House of Commons. But this provision, as stated above, was repealed in 1707. Under the old Government of India Act, the phrases used were '*official*' and '*non-official*'. These expressions were defined in old s. 134 which laid down that they mean respectively a person who is or is not in the civil or military service of the Crown in India, and the rules under the Act may provide for the holders of such offices specified in the rules not being treated as officials for the purposes of the Act. By the Non-official (Definition) Rules made under old s. 134, it was provided that the holder of any office in the civil or military service of the Crown, if the office is one which does not involve both of the following incidents, namely, that the incumbent (*a*) is a whole-time servant of the Government, and (*b*) is remunerated either by salary or fees, shall not be treated as an official for any of the purposes of the old Act. Under old s. 80B, it is provided that an official shall not be qualified for election as a member of the local Legislative Council, and if any non-official member, whether elected or nominated, accepts any office in the service of the Crown in India, his seat shall become vacant, but a minister is not to be deemed an official. On the draft Non-official (Definition) Rules forwarded by the Government of India, the Joint Select Committee in their Second Report on the Draft Rules under the Government of India Act, 1919, dated 10 August 1929, said:

> The committee consider them the most appropriate solution of the problem they are intended to solve—namely the settlement of the somewhat complicated question whether the large class of persons such as village officials, Government pleaders, law lecturers, etc., who though in receipt of fees or small allowances from the Government are not whole-time Government servants, are to be regarded as officials for the purposes of the Act.

The new Act has repealed the old law about officials and non-officials. The exact significance of the phrase 'office of profit under the Crown in India' in s. 26 has not been made clear in the Act itself. But it is open to the Federal or the Provincial Legislature[2] by an Act to declare what offices will not disqualify their holder from being a member of that Legislature. But a difficulty might be created for the first election under the new Act to the Federal or the Provincial Legislature and thereafter until such an Act is passed. It is not open to the Provincial Legislature, until Part III of the Act is brought into operation, to pass an Act specifying what is not an office of profit under s. 69(1) (*a*). Similarly before the Federal Legislature can come into existence, no Act can be passed by it under s. 26(1) (*a*) about this matter. To permit persons like the present members of the Governor-General's Executive Council, and the ministers, and part-time officers like a lecturer in a Government

[1] For a full discussion, see Anson, *Law of the Constitution* (5th ed.), Vol. I, at pp. 89-90, 101.

[2] See s. 69.

law college or commercial institute, a Government pleader, or Public Prosecutor to stand for the first election, before any Act of any Legislature can be passed exempting such office-holders from being regarded as holders of offices of profit, s. 307 has been passed which enables them to stand for the first election, after which it is presumed the necessary Act will be passed. It is to be noted that s. 307 reproduces the principle of the Non-official (Definition) Rules made under the old Act. It may be presumed that the same principle will be embodied in the new Act that will be passed.

The Advocate-General also holds an office of profit, but under ss. 21 and 64 he has the right to take part in the proceedings of a Chamber of the Legislature.[1]

The President, the Deputy-President, the Speaker and the Deputy-Speaker of the several Chambers of the Federal and the Provincial Legislatures (who are members) receiving salaries under ss. 22(4) and 65(4) of the new Act would not be holding offices of profit under the Crown, for they are appointed, not by the Crown, but by a Chamber of the Legislature under the new Act, such appointment not requiring sanction.

The disqualifications for being elected and for remaining member under the old Act were provided by rules made under old s. 64(1). W.P. Prop. 34 proposed certain disqualifications and omitted the disqualification under rules made under the old Act following (subject to a dispensing power) upon conviction for a criminal offence involving a sentence of imprisonment exceeding one year. This did not meet with approval in J.C.R. 138. In the present Act the period of imprisonment to disqualify a candidate has been raised to two years or more. But such disqualification will cease after five years (or such shorter period as the Governor-General may think fit to direct) from the date of release.

Election offences are a disqualification, as under the old law.

Cl. (3): If a member of the Legislature becomes disqualified under Cl. (1) (*d*) on being found guilty of an election offence, under Cl. (1) (*e*) and being sentenced to imprisonment for at least two years, he is given time to appeal or petition for revision against the order passed against him and remains member pending the disposal of his application; but during this period he cannot sit or vote.

Cl. (4): Cf. old s. 80B; a minister was not disqualified as an official. A Government official, whose services have been lent to a Federated State, may be a State representative in the Federal Legislature.

Penalty for sitting and voting when not qualified, or when disqualified

27. If a person sits or votes as a member of either Chamber when he is not qualified or is disqualified for membership thereof, or when he is prohibited from so doing by the provisions of subsection (3) of the last preceding section, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Federation.

This is new. The White Paper proposal, paragraph 35, provided that the penalty is to be recovered in the High Court of the Province or State which the person in respect of whom the complaint is made repre-

[1] See notes to s. 21 above.

sents, by suit instituted with the consent of the principal law officer of the Federation, i.e. the Advocate-General. Any member of Parliament, who sits or votes in the House of Commons after becoming disqualified, is liable to a daily fine of £500.

28.—(1) Subject to the provisions of this Act and to the rules and standing orders regulating the procedure of the Federal Legislature, there shall be freedom of speech in the Legislature, and no member of the Legislature shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either Chamber of the Legislature of any report, paper, votes or proceedings.

Privileges etc. of members

(2) In other respects, the privileges of members of the Chambers shall be such as may from time to time be defined by Act of the Federal Legislature and, until so defined, shall be such as were immediately before the establishment of the Federation enjoyed by members of the Indian Legislature.

(3) Nothing in any existing Indian Act, and, notwithstanding anything in the foregoing provisions of this section, nothing in this Act, shall be construed as conferring, or empowering the Federal Legislature to confer, on either Chamber or on both Chambers sitting together, or on any committee or officer of the Legislature, the status of a court, or any punitive or disciplinary powers other than a power to remove or exclude persons infringing the rules or standing orders, or otherwise behaving in a disorderly manner.

(4) Provision may be made by an Act of the Federal Legislature for the punishment, on conviction before a Court, of persons who refuse to give evidence or produce documents before a committee of a Chamber when duly required by the chairman of the committee so to do:

Provided that any such Act shall have effect subject to such rules for regulating the attendance before such committees of persons who are, or have been, in the service of the Crown in India, and safeguarding confidential matter from disclosure, as may be made by the Governor-General exercising his individual judgment.

(5) The provisions of subsections (1) and (2) of this section shall apply in relation to persons who by virtue of this Act have the right to speak in, and otherwise take part in the proceedings of a Chamber as they apply in relation to members of the Legislature.

See Introduction under heads—PRIVILEGES OF INDIAN LEGISLATURE, FREEDOM OF SPEECH, PUBLICATION. For the Provinces, see s. 71.

Salaries and allowances of members

29. Members of either Chamber shall be entitled to receive such salaries and allowances as may from time to time be determined by Act of the Federal Legislature and, until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the date of the establishment of the Federation applicable in the case of members of the Legislative Assembly of the Indian Legislature.

The old Act did not contemplate payment of salaries to members of the Legislature. This may be done by an Act of the Federal Legislature. Until otherwise provided by such an Act, the present allowances (e.g.—for travelling, for halting, etc.) will continue. In Australia, both the senators and the members of the Lower House get £1,000 a year each now, in place of £400 originally allowed by s. 48 of the Australia Act. In Canada, under s. 56 of the Canada Act, the allowance of the members of the legislature is £750 per annum, subject to deduction at the rate of £6 daily for absence which may be condoned.

In England, since 1911, every member of the House of Commons not in receipt of any salary otherwise, gets a salary of £400 per annum. Members are sometimes also paid by private bodies, e.g. trade unions, but the view has been authoritatively expressed that a contract to pay a member in return for his support in Parliament of the views of a particular person or party would be contrary to public policy.[1] Under s. 45 of the Australia Act, if any senator or member of the Lower House directly or indirectly takes or agrees to take any fee or honorarium for services rendered in the Parliament to any person or state, his seat shall thereupon become vacant.

Legislative Procedure

Provisions as to introduction and passing of Bills

30.—(1) Subject to the special provisions of this Part of this Act with respect to financial Bills, a Bill may originate in either Chamber.

(2) Subject to the provisions of the next succeeding section, a Bill shall not be deemed to have been passed by the Chambers of the Legislature unless it has been agreed to by both Chambers, either without amendment or with such amendments only as are agreed to by both Chambers.

(3) A Bill pending in the Legislature shall not lapse by reason of the prorogation of the Chambers.

(4) A Bill pending in the Council of State which has not been passed by the Federal Assembly shall not lapse on a dissolution of the Assembly.

[1] See per Lord Shaw in *A.S.R.S.* v. *Osborne* (1910) A.C. 87 at p. 111.

(5) A Bill which is pending in the Federal Assembly or which having been passed by the Federal Assembly is pending in the Council of State shall, subject to the provisions of the next succeeding section, lapse on a dissolution of the Assembly.[1]

Cl. (1): For *financial Bills*, see ss. 33–37. Demands for grants are to be first submitted to the Federal Assembly and then to the Council of State. Financial Bills are to originate in the Federal Assembly (s. 37).

Cl. (2): See s. 63, old Act and W.P. Prop. 39.

Cl. (4): Under s. 18(4), the Council of State is to be a permanent body and a Bill introduced there is not affected by the dissolution of the Assembly.

Joint sittings of both Chambers in certain cases

31.—(1) If after a Bill has been passed by one Chamber and transmitted to the other Chamber—

(*a*) the Bill is rejected by the other Chamber; or

(*b*) the Chambers have finally disagreed as to the amendments to be made in the Bill; or

(*c*) more than six months elapse from the date of the reception of the Bill by the other Chamber without the Bill being presented to the Governor-General for his assent,

the Governor-General may, unless the Bill has lapsed by reason of a dissolution of the Assembly, notify to the Chambers, by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill:

Provided that, if it appears to the Governor-General that the Bill relates to finance or to any matter which affects the discharge of his functions in so far as he is by or under this Act required to act in his discretion or to exercise his individual judgment, he may so notify the Chambers notwithstanding that there has been no rejection of or final disagreement as to the Bill and notwithstanding that the said period of six months has not elapsed, if he is satisfied that there is no reasonable prospect of the Bill being presented to him for his assent without undue delay.

In reckoning any such period of six months as is referred to in this subsection, no account shall be taken of any time during which the Legislature is prorogued or

[1] See Introduction to the Chapter under Relation between the two Houses: Bills. See W.P. Intr. 16; W.P. Prop. 38, 41 and 48; J.C.R. 215. For restrictions on discussion of a Bill in the Federal Legislature, see s. 40.

during which both Chambers are adjourned for more than four days.

(2) Where the Governor-General has notified his intention of summoning the Chambers to meet in a joint sitting, neither Chamber shall proceed further with the Bill, but the Governor-General may at any time in the next session after the expiration of six months from the date of his notification summon the Chambers to meet in a joint sitting for the purpose specified in his notification and, if he does so, the Chambers shall meet accordingly:

Provided that, if it appears to the Governor-General that the Bill is such a Bill as is mentioned in the proviso to subsection (1) of this section, he may summon the Chambers to meet in a joint sitting for the purpose aforesaid at any date, whether in the same session or in the next session.

(3) The functions of the Governor-General under the provisos to the two last preceding subsections shall be exercised by him in his discretion.

(4) If at the joint sitting of the two Chambers the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Chambers present and voting, it shall be deemed for the purposes of this Act to have been passed by both Chambers:

Provided that at a joint sitting—

(*a*) if the Bill, having been passed by one Chamber, has not been passed by the other Chamber with amendments and returned to the Chamber in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;

(*b*) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Chambers have not agreed;

and the decision of the person presiding as to the amendments which are admissible under this subsection shall be final.

(5) A joint sitting may be held under this section and a Bill passed thereat notwithstanding that a dissolution of the Assembly has intervened since the Governor-General

notified his intention to summon the Chambers to meet therein.[1]

Under s. 67(3), old Act, in case a Bill passed by one Chamber is not, within six months, passed by the other Chamber, without amendments or with agreed amendments, the Governor-General may in his discretion refer the matter to a joint sitting.[2]

Old law

In W.P. Prop. 48 and J.C.R. 215, it was proposed that in relation to demands for grants, the Upper House should have the power to require, on a motion to that effect being moved on behalf of the Government, that any demand reduced or rejected by the Assembly should be brought before a joint session. But this proposal has been dropped in the new Act. It is only the Governor-General who has the power to direct a joint sitting of both Houses. He may, in case of difference between them over any Bill, summon a joint sitting. In the cases of Bills mentioned in proviso to subsection (1)—i.e. Bills relating to finance or to matters affecting the discharge of the functions entrusted to him at his discretion or in his individual judgement, he may, at his discretion, convene an immediate joint session.

As mentioned in the Report of the Joint Parliamentary Committee,[3] to enable the Upper House to have an effective voice in the final decision, the numerical proportion between the two Houses has been fixed approximately at 2 : 3 ; in any event the will of the Lower House shall prevail ultimately. Under s. 308(2) (*a*), no amendment may be proposed by any Legislature for submission to His Majesty, which would vary the proportion between the number of seats in the Council of State and the number of seats in the Federal Assembly.

In his discretion : In his individual judgment : See Introduction to Part II, Chapter II under these headings.

In s. 38(4) it is provided that at the joint sitting of the two Chambers, the President of the Council of State, or in his absence, such persons as may be determined by rules of procedure made under s. 38(2) by the Governor-General, shall preside ; and his decision as to the admissibility of amendments to be moved at the joint sitting shall be final : see s. 31(4). For joint sitting convened when there is a difference between the two Chambers in respect of a demand for grant, see s. 34(3). For RULES OF PROCEDURE applicable to joint sittings, see s. 38(2). The English language is to be used at these sittings, but the rules shall provide that a person, unable to speak English, may be permitted to use another language.[4]

President

32.—(1) When a Bill has been passed by the Chambers, it shall be presented to the Governor-General, and the Governor-General shall in his discretion declare either that he assents in His Majesty's name to the Bill, or that he

Assent to Bills and power of Crown to disallow Acts

[1] See Introduction to this Chapter under DEADLOCKS, and under BILLS. For JOINT SITTING in the Provincial Legislature, see s. 74 ; see s. 67(3), old Act, and old Legislative Assembly Rules 37–39 ; W.P. Prop. 38, 41 and 48 ; J.C.R. 215-16.

[2] See old Indian Legislative Rules 37–39.

[3] Par. 216.

[4] See s. 39.

withholds assent therefrom, or that he reserves the Bill for the signification of His Majesty's pleasure :

Provided that the Governor-General may in his discretion return the Bill to the Chambers with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and the Chambers shall reconsider the Bill accordingly.

(2) A Bill reserved for the signification of His Majesty's pleasure shall not become an Act of the Federal Legislature unless and until, within twelve months from the day on which it was presented to the Governor-General, the Governor-General makes known by public notification that His Majesty has assented thereto.

(3) Any Act assented to by the Governor-General may be disallowed by His Majesty within twelve months from the day of the Governor-General's assent, and where any Act is so disallowed the Governor-General shall forthwith make the disallowance known by public notification, and as from the date of the notification the Act shall become void.[1]

Old law

Under s. 68(2) of the old Act, after a Bill has been passed by both Houses, it shall not become law until the Governor-General has assented thereto or, in the case of a Bill reserved for signification of His Majesty's pleasure, until His Majesty in Council has signified his assent. Under s. 81 of the old Act, the Governor may assent to a Bill passed by a local legislature or reserve it for assent by the Governor-General; and under the Reservation of Bills Rules, made under s. 12(1) of the old Act, rules were made requiring the Governor to reserve for the assent of the Governor-General certain Bills which *inter alia* affect the religion of any class of British subjects, affect prejudicially the land revenue of a Province, affect any matters which he is specially charged in his Instrument of Instructions or affect any central subject or the interests of another Province. Instead of assenting the Governor could send the Bill for reconsideration by the Legislature.[2] Under s. 69, old Act, even after assent has been given to a Bill by the Governor-General, His Majesty in Council could disallow the Act, at any time.

Change

Under the new law, the Governor under s. 75 (as in the old Act) and also the Governor-General can return the Bill for reconsideration; and under s. 76(1), the Governor-General, when the Bill passed by a Provincial Legislature is reserved by the Governor for his consideration, may direct the Governor to return the Bill for reconsideration or he may reserve the

[1] See Appendix I under RESERVATION and DISALLOWANCE; W.P. Prop. 39; J.C.R. 143, 212, and 357.

[2] S. 81A, old Act.

Bill for signification of His Majesty's pleasure. Unless His Majesty has assented to the Bill within twelve months of its being presented to the Governor-General for sanction, the Bill does not become an Act. Similarly under s. 76(4) for provincial Bills reserved for His Majesty's assent. A time limit has now been fixed.

Procedure in Financial Matters

33.—(1) The Governor-General shall in respect of every financial year cause to be laid before both Chambers of the Federal Legislature a statement of the estimated receipts and expenditure of the Federation for that year, in this Part of this Act referred to as the "annual financial statement". Annual financial statement

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(*a*) the sums required to meet expenditure described by this Act as expenditure charged upon the revenues of the Federation; and

(*b*) the sums required to meet other expenditure proposed to be made from the revenues of the Federation,

and shall distinguish expenditure on revenue account from other expenditure, and indicate the sums, if any, which are included solely because the Governor-General has directed their inclusion as being necessary for the due discharge of any of his special responsibilities.

(3) The following expenditure shall be expenditure charged on the revenue of the Federation:—

(*a*) the salary and allowances of the Governor-General and other expenditure relating to his office for which provision is required to be made by Order in Council;

(*b*) debt charges for which the Federation is liable, including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;

(*c*) the salaries and allowances of ministers, of counsellors, of the financial adviser, of the advocate-general, of chief commissioners, and of the staff of the financial adviser;

(*d*) the salaries, allowances, and pensions payable to or in respect of judges of the Federal Court, and the pensions payable to or in respect of judges of any High Court;

(e) expenditure for the purpose of the discharge by the Governor-General of his functions with respect to defence and ecclesiastical affairs, his functions with respect to external affairs in so far as he is by or under this Act required in the exercise thereof to act in his discretion, his functions in or in relation to tribal areas, and his functions in relation to the administration of any territory in the direction and control of which he is under this Act required to act in his discretion: provided that the sum so charged in any year in respect of expenditure on ecclesiastical affairs shall not exceed forty-two lakhs of rupees, exclusive of pension charges;

(f) the sums payable to His Majesty under this Act out of the revenues of the Federation in respect of the expenses incurred in discharging the functions of the Crown in its relations with Indian States;

(g) any grants for purposes connected with the administration of any areas in a Province which are for the time being excluded areas;

(h) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(i) any other expenditure declared by this Act or any Act of the Federal Legislature to be so charged.

(4) Any question whether any proposed expenditure falls within a class of expenditure charged on the revenues of the Federation shall be decided by the Governor-General in his discretion.

See Introduction to this Chapter under FINANCIAL BILLS AND DEMANDS FOR GRANTS and RELATION OF THE TWO HOUSES OF FEDERAL LEGISLATURE.

Old law[1]

For procedure in the Provinces, see s. 78.

There is no Annual Appropriation Act in India, the portion for the appropriation of revenue requiring the vote of the Legislature being submitted to it in the form only of demands for grants, a resolution of the Legislature approving the demand being a sufficient warrant for the appropriation. The Joint Parliamentary Committee assume that, as under the old law, the Governments of India will, within limits, continue to possess the powers of *virement* or reappropriation.

[1] See old s. 67A (Central) and Indian Legislative Rules 43–50; and old s. 72D (provincial) and Rules for Governor's Legislative Council, Nos. 25–32.

New law

Under the old law, the estimated annual expenditure and revenue (now called the annual financial statement) of the Governor-General in Council was to be laid in the form of a statement before both the Chambers of the Indian Legislature every year. Proposals for the appropriation of revenue for certain heads of expenditure were not to be submitted to the vote of the Legislature (non-voted), e.g. for interest and sinking fund charges on loans, salaries and pensions of officers, and expenditure for defence. The other heads of expenditure (voted) were to be submitted to the vote of the Legislative Assembly in the form of demands for grants. If any demand considered by the Governor-General as essential to the discharge of his responsibilities has been reduced or refused by the Assembly, he can disregard such vote. The Council of State under the old law had no hand over the budget. But this has now been changed. As explained in the note to s. 30, the Upper House has been given nearly co-equal powers with the Lower House in legislation except in the case of financial Bills. As provided in s. 34(2), the voted heads of expenditure are to be first submitted to the vote of the Federal Assembly and then to that of the Council of State and the latter has power to assent to, reduce, or refuse any demand for grant, just like the Lower House. In case there is any difference of opinion regarding a demand for grant, the Governor-General shall summon a joint sitting.[1] If the two Chambers have refused or reduced any demand for grant, the Governor-General, if he is in opinion that the vote affects the due discharge of his special responsibilities, may sanction an additional amount not exceeding the amount of the rejected demand or the reduction.[2]

Provinces

Under the old law, the budget defined as the statement of the estimated annual expenditure and revenue of the Province, by the Bengal Legislative Council Standing Order 2(1), was to be presented to the Council on a day fixed by the Governor. In respect of the grant proposed for each department of the Government, a separate demand was to be ordinarily made. Demands affecting the reserved and transferred subjects were to be kept distinct as far as possible. Each demand was to contain first a statement of the total grant proposed and then a statement of the detailed estimates under each grant. The budget was to be dealt with by the Council in two stages: (1) a general discussion, and (2) the voting of demands for grants. On a day to be appointed by the Governor subsequent to the day on which the budget is presented, and for such time as may be allotted by the Governor, the Council may discuss the budget as a whole or any question of principle involved therein but no motion regarding the budget is to be moved or submitted to vote. Not more than twelve days are to be allotted by the Governor for discussion of the demands for grants. Motions may be moved at this stage to reduce any grant or to omit or reduce any item or any grant but not to increase or alter the destination of the grant. But no proposal for the appropriation of any revenues for any purpose can be made except on the recommendation of the Governor. As soon as the maximum time limit for the discussion of each separate demand for grant is reached, the President is forthwith to put every question necessary to dispose of the demand under discussion (guillotine). On the last of the allotted twelve days, at 5 o'clock the President is forthwith to put every question necessary to dispose of all the outstanding matters in connexion with the demand for grants.

[1] See s. 34(3).

[2] See s. 35(1).

The local Government had the power under s. 72D(2), Prov. (*a*) of the old Act to treat a demand as assented to (though in fact withheld or reduced) if it related to a reserved subject and the Governor certified that the expenditure was essential to the discharge of his responsibility on the subject. The Governor had similarly power under s. 72D, Prov. (*b*) of the old Act, in case of emergency to authorize such expenditure as was in his opinion necessary for the safety or tranquillity of the service or for carrying on of any department.

Difference in procedure in financial matters

In the Provincial Legislature (with two Chambers) as the Joint Parliamentary Committee state in paragraph 150 of their Report, the Upper House or the Legislative Council is not in any way to be regarded in any sense as a body having equal powers with the Lower House or the Legislative Assembly, but rather as a body with powers of revision and delay, to exercise a check upon hasty and ill-considered legislation. So as regards the provincial budget, this is to be passed only by the Legislative Assembly (where there are two Houses); money Bills are to be initiated in, and demands for grants submitted to, the Legislative Assembly, alone.[1]

It is laid down by s. 317 of the Act that certain provisions of the old Act with amendments consequential on the provisions of the new Act, as set out in the Ninth Schedule, are to continue to have effect notwithstanding the repeal of the old Act. By paragraph 4 of the Government of India (Commencement and Transitory Provisions) (No. 2) Order, 1936, it is laid down that regarding the financial statement for the financial year beginning on the first day of April, 1937, section 67A of the old Act, as modified in the Ninth Schedule, is to apply. S. 33 is not to be in force before the Federation comes into existence. See notes to s. 145.

Cl. (2) (b): *Revenues of the Federation* defined in s. 136. For *other expenditure*, see s. 140(1)—Proceeds of salt duties, excise duties and export duties payable to the Provinces and the Federated States; s. 140(2)—Proceeds of jute export duty payable to Province growing jute; s. 142—grants to Provinces; s. 148—certain payments to Federated States charged on the revenues of the Federation.

Cl. (3): See J.C.R. 147-48 and 214. Expenditure charged on the revenues of the Federation are not to be submitted to the vote of the Legislature; see s. 34(1). For other such expenditure, see s. 148—payments made to Federated States: s. 197(2)—amount payable to railway by Secretary of State; s. 197(8)—expenses of the Railway Tribunal; s. 247(4)—salary of officials; s. 268—expenses of Federal Public Service Commission.

(*a*) and (*f*): These are not to be even discussed in the Legislature. See s. 34(1). For salary, allowances and other expenditure of the Governor-General, see the Third Schedule.

(*c*): For salaries of ministers, see s. 10(3); of councillors, see s. 11(2); of financial adviser, see s. 153(3); of Advocate-General, see s. 16(3).

(*d*): For salaries, etc. of judges of the Federal Court, see s. 201; of judges of the High Court, see s. 221.

(*e*): For the functions of the Governor-General in respect of defence, ecclesiastical affairs and external affairs, see s. 11. For his functions in respect of tribal areas, see s. 8(1) (*c*). The territories in

[1] See s. 78. Prov.

the control of which he is required to act in his discretion are the Chief Commissioners' Provinces as provided in ss. 94–98.

(*g*) : Excluded areas—see s. 91.

(*h*) : e.g. an award made against the Secretary of State in an arbitration between a railway and the railway authority or the Federal Government under s. 197(2).

Procedure in Legislature with respect to estimates

34.—(1) So much of the estimates of expenditure as relates to expenditure charged upon the revenues of the Federation shall not be submitted to the vote of the Legislature, but nothing in this subsection shall be construed as preventing the discussion in either Chamber of the Legislature of any of those estimates other than estimates relating to expenditure referred to in paragraph (*a*) or paragraph (*f*) of subsection (3) of the last preceding section.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the Federal Assembly and thereafter to the Council of State, and either Chamber shall have power to assent or to refuse to assent to any demand, or to assent to any demand subject to a reduction of the amount specified therein :

Provided that, where the Assembly have refused to assent to any demand, that demand shall not be submitted to the Council of State, unless the Governor-General so directs and, where the Assembly have assented to a demand subject to a reduction of the amount specified therein, a demand for the reduced amount only shall be submitted to the Council of State, unless the Governor-General otherwise directs ; and where, in either of the said cases, such a direction is given, the demand submitted to the Council of State shall be for such amount, not being a greater amount than that originally demanded, as may be specified in the direction.

(3) If the Chambers differ with respect to any demand the Governor-General shall summon the two Chambers to meet in a joint sitting for the purpose of deliberating and voting on the demand as to which they disagree, and the decision of the majority of the members of both Chambers present and voting shall be deemed to be the decision of the two Chambers.

(4) No demand for a grant shall be made except on the recommendation of the Governor-General.[1]

[1] See W.P. Prop. 46–48 ; J.C.R. 215-16. See notes to s. 33, cf. s. 67A, old Act regarding the Indian budget.

Cl. (3) : *Joint sitting* : See Introduction to this Chapter under DEADLOCKS, and notes to s. 31.

Cl. (4) : See notes to s. 37.

Under the old law, the estimated annual expenditure is to be laid before both the Legislative Assembly and the Council of State but the proposals for the votable heads of expenditure are to be submitted to the vote of the Legislative Assembly only, which may assent or refuse its assent to any demand or reduce any demand. The Council of State had no such power of reduction or refusal. Under the new constitution, such power is given not only to the Legislative Assembly but also to the Council of State. This is new. As was pointed out by the Joint Parliamentary Committee in paragraph 215 of their Report, the object is to provide that the powers of each of the two Houses in relation to any demand should be identical, any difference of opinion being resolved at a joint session to be held forthwith.[1]

Authentication of schedule of authorised expenditure

35.—(1) The Governor-General shall authenticate by his signature a schedule specifying—

(*a*) the grants made by the Chambers under the last preceding section ;

(*b*) the several sums required to meet the expenditure charged on the revenues of the Federation but not exceeding, in the case of any sum, the sum shown in the statement previously laid before the Legislature :

Provided that, if the Chambers have not assented to any demand for a grant or have assented subject to a reduction of the amount specified therein, the Governor-General may, if in his opinion the refusal or reduction would affect the due discharge of any of his special responsibilities, include in the schedule such additional amount, if any, not exceeding the amount of the rejected demand or the reduction, as the case may be, as appears to him necessary in order to enable him to discharge that responsibility.

(2) The schedule so authenticated shall be laid before both Chambers but shall not be open to discussion or vote therein.

(3) Subject to the provisions of the next succeeding section, no expenditure from the revenues of the Federation shall be deemed to be duly authorised unless it is specified in the schedule so authenticated.

Under old s. 67A(7), the Governor-General, if satisfied that any demand refused by the Legislative Assembly was essential to the dis-

[1] See Introduction to this Chapter under FINANCIAL BILLS AND DEMANDS FOR GRANTS.

charge of his responsibilities, could act as if it had been assented to, notwithstanding the refusal or reduction of the grant by the Legislative Assembly.[1]

Supplementary statements of expenditure

36. If in respect of any financial year further expenditure from the revenues of the Federation becomes necessary over and above the expenditure theretofore authorised for that year, the Governor-General shall cause to be laid before both Chambers of the Federal Legislature a supplementary statement showing the estimated amount of that expenditure, and the provisions of the preceding sections shall have effect in relation to that statement and that expenditure as they have effect in relation to the annual financial statement and the expenditure mentioned therein.[2]

Under old Legislative Council Rule 32 as it originally stood, an estimate for such grant could be presented when (1) the amount voted for the grant is found insufficient for the purpose ; or (2) a need arises during the current year for expenditure requiring the vote of the Council for some new service not contemplated when the budget was presented. This would not apply to the case of a votable demand rejected or reduced by the Council, which could not be certified.[3] But R. 32 was amended so as to allow of an estimate for supplementary or additional grant being presented in respect of a demand refused or reduced by the Council. See notes under ss. 41 and 81.

Whether a votable demand (in respect of which the vote of the Legislature is final and which does not affect the Governor in the discharge of his special responsibilities under s. 35(1), Prov. or s. 80(1), Prov.) can be included in a supplementary demand has not been specifically dealt with in this section. But the words are very wide ; yet it seems to be a matter of doubt whether they cover such a case.

Special provisions as to financial Bills

37.—(1) A Bill or amendment making provision—

(*a*) for imposing or increasing any tax ; or

(*b*) for regulating the borrowing of money or the giving of any guarantee by the Federal Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Federal Government ; or

1 For the Governor-General's Special Responsibilities, see s. 12 and notes thereunder.

2 For supplementary grant in the Provincial Legislature, see s. 81. See old Indian Legislative Rule 49 for excess grant and Rule 50 for supplementary or additional grant ; and also old Legislative Council Rule 31 for excess grant, and Rule 32 for supplementary or additional grant.

3 See *K. S. Roy* v. *H. E. A. Cotton and ors.* (1924) 40 C.L.J. 515.

(c) for declaring any expenditure to be expenditure charged on the revenues of the Federation, or for increasing the amount of any such expenditure,

shall not be introduced or moved except on the recommendation of the Governor-General, and a Bill making such provision shall not be introduced in the Council of State.

(2) A Bill or amendment shall not be deemed to make provision for any of the purposes aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the revenues of the Federation shall not be passed by either Chamber unless the Governor-General has recommended to that Chamber the consideration of the Bill.

As stated in paragraph 45 of the White Paper proposals a recommendation of the Governor-General will be required for any proposal in either Chamber of the Legislature for the imposition of taxation, for the appropriation of public revenues, or any proposal affecting the public debt, or affecting, or imposing any charge upon, public revenues. This is the accepted constitutional principle in all parts of the British Empire. See s. 67A(2) of the old Act which says that no proposal for the appropriation of any revenues or money for any purpose is to be made except on the recommendation of the Governor-General.

As regards the position of the Council of State *vis-a-vis* the Legislative Assembly in financial matters, see Introduction to this Chapter under RELATION BETWEEN THE TWO HOUSES : FINANCIAL BILLS. See s. 34(4).

Procedure Generally

Rules of procedure

38.—(1) Each Chamber of the Federal Legislature may make rules for regulating, subject to the provisions of this Act, their procedure and the conduct of their business :

Provided that as regards each Chamber the Governor-General shall in his discretion, after consultation with the President or the Speaker, as the case may be, make rules—

(a) for regulating the procedure of, and the conduct of business in, the Chamber in relation to any matter which affects the discharge of his functions in so far as he is by or under this Act required to act in his discretion or to exercise his individual judgment ;

(b) for securing the timely completion of financial business;

(c) for prohibiting the discussion of, or the asking of questions on, any matter connected with any Indian State, other than a matter with respect to which the Federal Legislature has power to make laws for that State, unless the Governor-General in his discretion is satisfied that the matter affects Federal interests or affects a British subject, and has given his consent to the matter being discussed or the question being asked;

(d) for prohibiting, save with the consent of the Governor-General in his discretion,—

(i) the discussion of, or the asking of questions on, any matter connected with relations between His Majesty or the Governor-General and any foreign State or Prince; or

(ii) the discussion, except in relation to estimates of expenditure, of, or the asking of questions on, any matter connected with the tribal areas or the administration of any excluded area; or

(iii) the discussion of, or the asking of questions on, any action taken in his discretion by the Governor-General in relation to the affairs of a Province; or

(iv) the discussion of, or the asking of questions on, the personal conduct of the Ruler of any Indian State, or of a member of the ruling family thereof;

and, if and in so far as any rule so made by the Governor-General is inconsistent with any rule made by a Chamber, the rule made by the Governor-General shall prevail.

(2) The Governor-General, after consultation with the President of the Council of State and the Speaker of the Legislative Assembly, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Chambers.

The said rules shall make such provision for the purposes specified in the proviso to the preceding subsection as the Governor-General in his discretion may think fit.

(3) Until rules are made under this section, the rules of procedure and standing orders in force immediately before the establishment of the Federation with respect to the Indian Legislature shall have effect in relation to the Federal Legislature subject to such modifications and adaptations as may be made therein by the Governor-General in his discretion.

(4) At a joint sitting of the two Chambers the President of the Council of State, or in his absence such person as may be determined by rules of procedure made under this section, shall preside.[1]

By Rule 47 of the Indian Legislative Rules (passed by the Governor-General in Council under the old Act), he is to allot not more than 15 days for the *discussion of demands* in the Legislative Assembly and he has the power to allot time not exceeding two days, for the discussion of any one demand, and at the expiry of such time, the discussion is to be closed and the matter put to the vote at once. Rules 7–9, 22 and 23 of the above rules deal with MATTERS ON WHICH QUESTIONS MAY NOT BE ASKED OR DISCUSSION ALLOWED. These are: (1) matters affecting H.M.'s Government's or of the Governor-General's relations with a foreign state; (2) matter affecting their relations with any Prince or Chief under His Majesty's suzerainty or relating to the affairs, or to the administrations of territory, of any such Prince or Chief; and (3) matters under adjudication of any law Court.[2]

Joint sitting: May be convened by the Governor-General when the two Chambers differ about a Bill (relating to finance or otherwise), see s. 31; or when the two Chambers differ with respect to any demand, see s. 34(3).[3]

English to be used in the Federal Legislature

39. All proceedings in the Federal Legislature shall be conducted in the English language:

Provided that the rules of procedure of each Chamber and the rules with respect to joint sittings shall provide for enabling persons unacquainted, or not sufficiently acquainted, with the English language to use another language.

Rule 14 of the Indian Legislative Rules under the old Act provided that the business of the Indian Legislature is to be transacted in English but the President may permit any member not acquainted with English to speak in a vernacular. Before the Joint Parliamentary Committee, it was urged that provision should be made requiring the English language to be the official language of the Federation and of the superior Courts and one of the official languages of the Provincial Governments. They however did not think that any useful object would be served by any

[1] See Introduction to this Chapter under PROCEDURE.

[2] See Introduction to Part II, Chapter III, under FREEDOM of DISCUSSION.

[3] See Introduction to this Chapter under DEADLOCKS.

such general declaration. When dealing with discrimination, they recommend that no person is to be discriminated against on the ground that his mother tongue is English. They also recommend that the Letters Patent issued to the High Courts should prescribe English as the language of these Courts, and that the Constitution Act should provide that the business of all the Legislatures is to be conducted in English, a member unacquainted with it being allowed to address it in the vernacular. See s. 85 (Provincial Legislature), s. 227 (High Court) and s. 214(5) Federal Court.

40.—(1) No discussion shall take place in the Federal Legislature with respect to the conduct of any judge of the Federal Court or a High Court in the discharge of his duties. Restrictions on discussion in the Legislature

In this subsection the reference to a High Court shall be construed as including a reference to any Court in a Federated State which is a High Court for any of the purposes of Part IX of this Act.

(2) If the Governor-General in his discretion certifies that the discussion of a Bill introduced or proposed to be introduced in the Federal Legislature, or of any specified clause of a Bill, or of any amendment moved or proposed to be moved to a Bill, would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquillity of India or any part thereof, he may in his discretion direct that no proceedings, or no further proceedings, shall be taken in relation to the Bill, clause or amendment, and effect shall be given to the direction.

The Joint Parliamentary Committee in paragraph 336 of their Report lay stress on the importance of safeguarding the judiciary from criticism in the Legislature of their conduct in the discharge of their duties. The rule and practice of Parliament in England protect the judiciary from such criticism there and they recommend that adequate provision should be made to safeguard the judges in India also.

Under s. 47(2A) of the old Act, the Governor-General may direct that no proceedings or further proceedings shall be taken by that Chamber in relation to any Bill, clause or amendment.[1]

In his discretion: See Part II, Chapter II, Introduction under this heading.

Special responsibility: See s. 12.

41.—(1) The validity of any proceedings in the Federal Legislature shall not be called in question on the ground of any alleged irregularity of procedure. Courts not to inquire into proceedings of the Legislature

(2) No officer or other member of the Legislature in whom powers are vested by or under this Act for regulating

[1] See Introduction to this Chapter under FREEDOM OF DISCUSSION.

procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers.

See s. 87 for proceedings in a Provincial Legislature.

Under ss. 204–06, the Federal Court has jurisdiction to enter into the question of the validity of laws passed by the Federal Legislature, e.g. whether the subject dealt with by legislation is *intra-vires* or not, but this section prohibits Courts from going into the question of procedure only, and from deciding that as the proper procedure was not observed, the law was not properly passed. *In the matter of J. M. Sen Gupta* v. *H. E. A. Cotton,*[1] an application was made under s. 45 of the Indian Specific Relief Act for an order directing the Hon'ble Mr Cotton, President of the Bengal Legislative Council, to decide on the admissibility of a certain motion in the list of business to be brought forward at the next session of the Council and for an order that he be directed to forbear from putting the said motion before the Council for consideration. It was urged on behalf of the respondents *inter alia,* that the Parliament in passing the Government of India Act and in constituting Legislative Councils thereunder had kept in view the English constitutional principle that neither the judiciary nor the executive should interfere in any way with the conduct of business in the Legislative Councils. The application was dismissed on the ground that it did not come within the purview of s. 45 of the Specific Relief Act. To consider the same matter, a suit was filed: *K. S. Roy* v. *H. E. A. Cotton and ors.*[2]; it was held by the High Court that the proceedings of a subordinate legislature, like the local legislature, can be questioned in the High Court and that the President of the Bengal Legislative Council was not immune from the jurisdiction of the High Court; an injunction was granted against him.

Such proceedings in Court calling in question the validity of anything done in the Legislature on the ground of alleged irregularity of procedure will no longer be permitted under the new Act.

Officers of the Legislature who are protected from the jurisdiction of a Court in the performance of their duties are those in whom powers are vested by or under this Act. By s. 22, the officers appointed are: the President and the Deputy-President in the case of the Council of State, and the Speaker and the Deputy-Speaker in the case of the Legislative Assembly. It is open by rules made under s. 38 or by legislation (see s. 28(3)), to provide for the appointment of other officers to perform certain duties regarding regulation of procedure, conduct of business or maintenance of order. Such officers will enjoy the protection conferred by subsection (2) of this section, subject to s. 28(3), which regulates the power of the Federal Legislature or of either Chamber to punish strangers for contempt or to take disciplinary measures against them; see also s. 28(4) for punishment of person refusing to give evidence or to produce documents before a committee of a Chamber.[3]

[1] (1924) 51 Cal. 874.

[2] (1924) 40 C.L.J. 515.

[3] See Introduction to this Chapter under PRIVILEGES OF THE INDIAN LEGISLATURE.

CHAPTER IV

LEGISLATIVE POWERS OF GOVERNOR-GENERAL

INTRODUCTION

The provisions of this and the next chapters confer on the Governor-General legislative powers, which are capable of immediate employment in emergencies either when the Legislature is not in session or, if it is in session, to meet circumstances which necessitate immediate action. The Act vests in him power to promulgate ordinances whether the Federal Legislature is sitting or not, which will have the same force and effect as an act of the Federal Legislature, but only for a limited time.[1] These powers have been placed at the disposal of the Governor-General for the purpose of enabling him to discharge his special responsibilities when there is an emergency, even when the Federal Legislature is sitting.[2] A similar power has also been placed at the disposal of the Governor-General acting in his individual judgement after consulting his ministers, to meet cases of emergency when the Legislature is not in session, the ordinances resulting therefrom, being limited in duration to a specified period, unless previously revoked by the Legislature after its re-assembly. Thus, two kinds of emergency legislation are contemplated, the first made exclusively at the Governor-General's own discretion and in the discharge of functions in the reserved departments or of his special responsibilities; the second in his individual judgement after consulting the ministers.[3]

The Governor-General has been empowered to make ordinances, when an emergency exists, containing such provisions as, under the Act, it would have been competent for the Legislature to enact. The Governor-General can only exercise the power and no more than the power already vested in the Federal Legislature by the Act. He cannot exercise the ordinance power in relation to the States except in so far as his exercise of it relates to subjects in the Federal List (Schedule Seven of the Act) which the States have conceded by their Instrument of Accession.

The Act does not define under what circumstances the personal legislative powers of the Governor-General or the Governor are to be exercised, nor does it specify in any detail the action which he is authorized to take. These matters cannot be defined or specified and the Governor-General is therefore armed with a general discretionary power to step in when he thinks necessary, and to adopt such remedies as he thinks proper.[4]

Old law

Under s. 72 of the old Act, the Governor-General has the power, in case of emergency, to promulgate ordinances for the peace and good government of British India or any part thereof but such ordinance cannot be in force for more than six months. It has the same force as an Act passed by the

[1] See ss. 42 and 43. [2] See s. 43.

[3] See White Paper Introduction, pars. 40–44 and Proposals, pars. 53 and 54 and the J.C.R., pars. 108, 109 and 190.

[4] See J.C.L., pars. 105–9.

central Legislature and is subject to the same restrictions as the power of such Legislature to make laws; and an ordinance is subject to disallowance like an Act. Where the Legislature refuses leave to introduce, or fails to pass a Bill in a form recommended by the Governor-General or the Governor, he may certify that the passage of the Bill is essential for the safety, tranquillity or interests of British India, and it may become an Act expressed to be made by the Governor-General or the Governor.[1] Under the new Act, ordinances may be made both by the Governor-General and the Governor, and not by the Governor-General alone, as under the old Act.

New law

The Governor-General (or the Governor) has certain special powers in relation to the Federal (or Provincial) Legislature, to be exercised at his discretion or in his individual judgement for the purpose of enabling him to discharge his responsibilities for the administration of the reserved departments, for the discharge of his special responsibilities and for the fulfilment of duties in relation to the other matters left to his discretion under the Act. These special powers are:

(*a*) The power to take action notwithstanding the refusal of the Legislature to enact legislation in accordance with his requirements.

This may arise under the following circumstances:

(i) Where ministers refuse to be parties to a bill or to a provision in a Bill which the Governor-General regards as essential for the discharge of his responsibilities.
(ii) Where the Legislature refuses to enact a measure for which the ministers have accepted responsibility and which the Governor-General regards as essential.
(iii) Where the Legislature refuses to make appropriation of funds which the Governor-General regards as essential.

In all these cases, the Governor-General may take action by passing Governor-General's Acts which are to be distinguished from Acts made by the Governor-General by and with the consent of both Chambers of the Legislatures. Under the old law, no distinction was made between Acts passed by the Legislature and Acts passed under the Governor-General's power of certification of a Bill after rejection by the Legislature. But, under the new Act, where the Governor-General takes action against the wishes of the Legislature or of his ministers or of both, the responsibility for such action is made manifest, and the Acts will be styled 'Governor-General Acts', whereas those passed in the ordinary course by the Legislature, will be styled 'Acts enacted by the Governor-General by and with the consent of the Council of State and Federal Assembly'.[2]

(*b*) The Governor-General (or the Governor) is empowered in his discretion to arrest the course of discussion of measures in the Legislature.[3]

(*c*) The Governor-General (or the Governor) has the power (after consultation with the Speaker and President of the two Houses) to make rules of legislative business for the due exercise of his powers and responsibilities.

(*d*) The Governor-General has the power to decide in his discretion whether financial Bills rejected or altered by the Federal Assembly shall be submitted to the Council of State, and may direct joint sittings of both houses. The Governor has similar powers.

[1] See s. 67B(2), Prov. and s. 72E(2), Prov., old Act.

[2] See s. 32.

[3] See Part II, Chapter III, Introduction under FREEDOM OF DISCUSSION.

(e) The Governor-General may, after consultation with the President of the Council of State and the Speaker of the Federal Assembly, make rules of procedure as to joint sittings of, and communications between, the two Chambers. Similarly the Governor.

(f) The Governor-General, in his discretion may, for the discharge of his duties in the reserved departments and for discharging his special responsibilities, make ordinances which will have the force of law, for a temporary period. He may, with the consent of his ministers, make emergency ordinances when the Federal Legislature is not in session for a temporary period. Similarly the Governor.

(g) The Governor-General may in his discretion assent or withhold his assent to Bills passed by the Legislature or reserve them for the signification of His Majesty's pleasure or remit the Bill for reconsideration in whole or in part with or without amendment. Similarly the Governor.

(h) The Governor-General has the power, in case of breakdown of the constitutional machinery, to issue a Proclamation and to pass emergency legislation which will have effect for a period which may extend up to two years from the date the Proclamation ceases to have effect.[1]

Power of Governor-General to promulgate Ordinances during recess of Legislature

42.—(1) If at any time when the Federal Legislature is not in session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require:

Provided that the Governor-General—

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section if a Bill containing the same provisions would under this Act have required his previous sanction to the introduction thereof into the Legislature; and

(b) shall not, without instructions from His Majesty, promulgate any such ordinance if he would have deemed it necessary to reserve a Bill containing the same provisions for the signification of His Majesty's pleasure thereon.

(2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such ordinance—

(a) shall be laid before the Federal Legislature and shall cease to operate at the expiration of six weeks from the re-assembly of the Legislature, or, if before the expiration of that period resolutions disapproving it are passed by both

[1] See Introduction to Part II, Chapter IV.

Chambers, upon the passing of the second of those resolutions;

(b) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Federal Legislature assented to by the Governor-General; and

(c) may be withdrawn at any time by the Governor-General.

(3) If and so far as an ordinance under this section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.[1]

This section deals with a time when the Federal Legislature is not in session. The opinion of the ministers as to the issue of an ordinance will be taken, but the Governor-General in the exercise of his individual judgement may overrule his ministers. If he is satisfied that an emergency exists which renders such a course necessary, he may issue an ordinance in a matter which if it had been embodied in a Bill would have required his previous sanction before being introduced in the Legislature; e.g. matters covered by ss. 108(1), 141, 153 and 271. If a Bill embodying the matter dealt with by an ordinance would have been reserved for the signification of His Majesty's pleasure under s. 32, then the Governor-General cannot promulgate such an ordinance without instructions from His Majesty. The Governor-General when reserving any Bill for the signification of His Majesty's pleasure under s. 32 acts in his discretion; under s. 14, when exercising his discretion, he is to comply with the general or particular directions of the Secretary of State. If, for example, the Secretary of State directs him that Bills dealing with the question of release of persons convicted of terrorist outrages must be reserved for His Majesty's assent, then the Governor-General cannot pass an ordinance in this matter without instructions from His Majesty.

Ordinances made under this section are to be treated in all respects as an Act of the Federal Legislature assented to by the Governor-General, on a matter requiring previous sanction of the Governor-General for its introduction. So it may be disallowed by His Majesty under s. 32(3). So if the ordinance purports to deal with a matter outside the competence of the Federal Legislature, e.g. in a matter concerning a Federated State outside the terms of the Instrument of Accession, it is void. As soon as the Federal Legislature meets, the ordinance is to be laid before it and will cease to operate at the expiry of six weeks from the date of re-assembly of the Legislature, unless in the meantime both the Chambers have disapproved of it.[2] In the White Paper and the Report of the Joint Parliamentary Committee it was suggested that the Governor-General or the Governor should make ordinance when the Legislature was not in session, with the advice of his ministers. This has been modified in

[1] See W.P. Intr. 40; W.P. Prop. 53, 54, 103 and 104; J.C.R. 106 and 190; old Act, s. 72; see also the Introduction to this Chapter. For the Governor's power to issue ordinance, see s. 88.

[2] W.P. Prop. 104 and J.C.R. 108.

this section as he is to act in the exercise of his individual judgement, overriding the advice of his ministers if he thinks fit.

Power of Governor-General to promulgate ordinances at any time with respect to certain subjects

43.—(1) If at any time the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment, he may promulgate such ordinances as in his opinion the circumstances of the case require.

(2) An ordinance promulgated under this section shall continue in operation for such period not exceeding six months as may be specified therein, but may by a subsequent ordinance be extended for a further period not exceeding six months.

(3) An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such ordinance—

(*a*) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Federal Legislature assented to by the Governor-General;

(*b*) may be withdrawn at any time by the Governor-General; and

(*c*) if it is an ordinance extending a previous ordinance for a further period, shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.

(4) If and so far as an ordinance under this section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.

(5) The functions of the Governor-General under this section shall be exercised by him in his discretion.[1]

The Governor-General is to act in his discretion without consulting his ministers. The ordinance is to have the same effect as an Act of the Federal Legislature. It is to have effect for a period not exceeding six months as specified in the ordinance but may be extended for one additional period not exceeding six months by another ordinance. But

[1] See W.P. Prop. 103 and J.C.R. 108. See s. 89 for similar power of the Governor and notes to s. 42 above.

in the latter case, it is to be communicated at once to the Secretary of State and laid by him before both Houses of Parliament.

Power of Governor-General in certain circumstances to enact Acts

44.—(1) If at any time it appears to the Governor-General that, for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment, it is essential that provision should be made by legislation, he may by message to both Chambers of the Legislature explain the circumstances which in his opinion render legislation essential, and either—

(*a*) enact forthwith, as a Governor-General's Act, a Bill containing such provisions as he considers necessary; or

(*b*) attach to his message a draft of the Bill which he considers necessary.

(2) Where the Governor-General takes such action as is mentioned in paragraph (*b*) of the preceding subsection, he may at any time after the expiration of one month enact, as a Governor-General's Act, the Bill proposed by him to the Chambers either in the form of the draft communicated to them or with such amendments as he deems necessary, but before so doing he shall consider any address which may have been presented to him within the said period by either Chamber with reference to the Bill or to amendments suggested to be made therein.

(3) A Governor-General's Act shall have the same force and effect, and shall be subject to disallowance in the same manner, as an Act of the Federal Legislature assented to by the Governor-General and, if and in so far as a Governor-General's Act makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.

(4) Every Governor-General's Act shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.

(5) The functions of the Governor-General under this section shall be exercised by him in his discretion.[1]

Under s. 67B of the old Act, when either Chamber of the Legislature refuses leave to introduce, or fails to pass in a form recommended by the Governor-General, any Bill, he may certify that the passage of the

[1] See W.P. Prop. 92; J.C.R. 104. For the Governor's similar power to enact Acts, see s. 90.

Bill is essential for the safety, tranquillity or interests of British India or any part thereof, and the Bill shall on his signature be deemed to be an Act of the Indian Legislature. Similarly under s. 72E of the old Act, when the Provincial Legislature has refused leave to introduce, or has failed to pass in the form recommended by the Governor, any Bill relating to a reserved subject, the Bill on the Governor's signature shall be deemed to be an Act of the Legislature. The Joint Parliamentary Committee agree that the Governor-General (or the Governor) should have this reserve power of legislation. But whereas under the old Act, such an Act made by the Governor-General or the Governor was deemed to be an Act of the Legislature, under the new Act such act is declared to be (what indeed it is) the Governor-General's or the Governor's Act. It is not desirable that the Governor-General (or the Governor) should be required to submit a proposed Governor-General's (or Governor's) Act to the Legislature before enacting it. There may be cases however, where an opportunity may usefully be given to the Legislature for revising a hasty or ill-considered decision; the Governor-General (or the Governor) is given the power to notify to the Legislature by message of his intention after the expiry of one month to enact a Governor-General's (or a Governor's) Act, the terms of which would be set out in the message. It would then be open to the Legislature, if it thought fit, to present an address to the Governor-General (or the Governor within the period praying him to enact the Act with certain amendments which he would then consider; or it might even think fit to revise its former decision and to forestall the Governor by itself enacting legislation in the sense desired by him.

Validity of Ordinances and Governor-General's (or Governor's) Acts: —Sections 42(3) and 88(3) deal with cases where such Ordinances may be void. Sections 44(3) and 90(3) deal with cases where such Acts may be void. The question of their validity will be decided by the Federal Court on a case being properly brought before it under s. 204; or the matter may be referred by the Governor-General to the Court for its opinion under s. 213.

CHAPTER V

PROVISIONS IN CASE OF FAILURE OF CONSTITUTIONAL MACHINERY

Power of Governor-General to issue Proclamations

45.—(1) If at any time the Governor-General is satisfied that a situation has arisen in which the government of the Federation cannot be carried on in accordance with the provisions of this Act, he may by Proclamation—

(*a*) declare that his functions shall to such extent as may be specified in the Proclamation be exercised by him in his discretion ;

(*b*) assume to himself, all or any of the powers vested in or exercisable by any Federal body or authority,

and any such Proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any Federal body or authority :

Provided that nothing in this subsection shall authorise the Governor-General to assume to himself any of the powers vested in or exercisable by the Federal Court or to suspend, either in whole or in part, the operation of any provision of this Act relating to the Federal Court.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) A Proclamation issued under this section—

(*a*) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament ;

(*b*) unless it is a Proclamation revoking a previous Proclamation, shall cease to operate at the expiration of six months :

Provided that, if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of twelve months from the date on which under this subsection it would otherwise have ceased to operate.

(4) If at any time the government of the Federation has for a continuous period of three years been carried on

under and by virtue of a Proclamation issued under this section, then, at the expiration of that period, the Proclamation shall cease to have effect and the government of the Federation shall be carried on in accordance with the other provisions of this Act, subject to any amendment thereof which Parliament may deem it necessary to make, but nothing in this subsection shall be construed as extending the power of Parliament to make amendments in this Act without affecting the accession of a State.

(5) If the Governor-General, by a Proclamation under this section, assumes to himself any power of the Federal Legislature to make laws, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect, unless sooner repealed or re-enacted by Act of the appropriate Legislature, and any reference in this Act to Federal Acts, Federal Laws, or Acts or laws of the Federal Legislature shall be construed as including a reference to such a law.

(6) The functions of the Governor-General under this section shall be exercised by him in his discretion.

The Governor-General is empowered at his discretion, if at any time he is satisfied that a situation has arisen which renders it for the time being impossible for the government of the Federation to be carried on in accordance with the provisions of this Act, by Proclamation to assume to himself all such powers vested by law in any federal authority (except the Federal Court) as appear to him to be necessary for the purpose of securing that the government of the Federation shall be carried on effectively.[1]

A Proclamation so issued is to be communicated forthwith to the Secretary of State and laid before the Parliament and will cease to operate at the expiry of six months unless before the expiry of that period it has been approved by resolutions of both Houses of Parliament; and it may at any time be revoked by resolutions of both Houses of Parliament. If Parliament approves of the continuation of a Proclamation it shall, unless revoked, continue in force for a further period of twelve months from the date of expiry thereof. Such approval by Parliament may be given as often as Parliament thinks necessary, but in no case is a Proclamation to continue in operation for more than three years continuously.[2]

This section does not mean that the Governor-General in the event of a breakdown of the constitutional machinery is bound to take over the whole government of the Federation and administer it himself on his own undivided responsibility. The intention is to provide for the possibility of a partial breakdown and to enable the Governor-General

1 See W.P. Intr. 44; W.P. Prop. 55; J.C.R. 40, 109 and 169. For Governor's Proclamation, see s. 93.

2 See Cl. (4).

take over part only of the machinery of government, leaving the remainder to function according to ordinary law. Thus, the Governor-General might, if the breakdown were in the legislative machinery of the Federation alone, still carry on the government with the aid of his ministers, if they were willing to support him, in spite of the refusal of the Federal Legislature to function at all. The Act does not specify in any detail the action which the Governor-General might take under the provisions of this section. A constitutional breakdown implies no ordinary crisis, and the Governor-General has been armed with a general discretionary power to adopt measures as the circumstances might require.

Any Act made by the Governor-General under s. 45(5) or by the Governor under s. 93(5) will only prevail up to two years after the Proclamation ceases to have effect. It is unlike Governor-General's Act—or the Governor's Act, made under s. 44 or s. 90, in this respect. These latter are not temporary enactments.

Cl. (4) : The subsection provides that on the expiry of three years, if the government of the Federation cannot be carried on under the Act as it stands, and an amendment of the Act is required, any such amendment shall, so far as the States are concerned, be subject to provisions of sub-clause (5) of s. 6, Act and Schedule II.

The suspension of the constitution would involve the elimination of the powers and jurisdiction of the Indian States which were transferred to the Federation for a particular purpose which *ex hypothesi* has not been or cannot be carried out. If, therefore, for any reason the constitution were to remain suspended for more than three years, the purpose for which the States have acceded to the Federation would become impossible of attainment, and the Act would have to be amended in important particulars which would affect the accession of the States. The subsection provides that before the expiry of this time limit, either the normal provisions of the Act have resumed their operations, or an amending Act has to be passed subject to the safeguards for the States provided by s. 6(5).

Any Act made by the Governor-General under s. 45(5) or by the Governor under s. 93(5) will only prevail up to two years after the Proclamation ceases to have effect. It is unlike the Governor-General's Act—or the Governor's Act made under s. 44 or s. 90, in this respect. These latter are not temporary enactments.

In his discretion : It is to be noted that in taking action under this section, the Governor-General is independent of his ministers. His sole responsibility is to the Secretary of State and ultimately to Parliament.

PART III

THE GOVERNORS' PROVINCES

CHAPTER I

THE PROVINCES

INTRODUCTION

Constitution of the Provinces

British India has hitherto been a unitary state, the administrative control of which has been by law centred in the Secretary of State, in whom were vested powers of control over 'all acts, operations and concerns which relate to the government or revenues of India', and such powers as have appertained to the Provincial Governments in India were derived through the Central Government by a species of delegation from this central authority and were exercised subject to his control. The Provinces had no original or independent powers or authority.[1]

But, under the new Act, the Provinces are federally united and derive their powers and authority from a direct grant by the Crown.[2] The eleven Provinces, named below, become autonomous units of the Federation of India, the government of each being administered by a Governor representing the King, aided and advised by a council of ministers responsible to the Legislature of the Province : Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces and Berar, Assam, the North-West Frontier Province, Orissa and Sind. The scheme of provincial autonomy adopted in the Act is one whereby each of the Provinces named above, will possess an executive and a Legislature having exclusive authority within the Province in a precisely defined sphere, and, in that exclusively provincial sphere, broadly free from control by the Federal Government and Legislature. 'It represents', as the Joint Select Committee observe,[3] 'a fundamental departure from the present system, under which the provincial Governments exercised a devolved and not an original authority. The Act of 1919 and the Devolution Rules made under it, by earmarking certain subjects as "provincial subjects" created indeed a sphere within which responsibility for the functions of government rests primarily upon the provincial authorities, but that responsibility is not an exclusive one, since the Governor-General in Council and the Central Legislature still exercise an extensive authority throughout the whole of the Provinces.' Under the new constitution, the Federal Government and the Legislature (which replaces the old central Government and legislature) will not possess in the Governors' Provinces (as distinguished from th Chief Commissioners' Provinces) any legal power or authority with respect to any matter falling within the exclusive provincial sphere, though the Governor-General[4] in virtue of his p wer of supervising the Governors will have authority to secure compliance in certain respects with directions which he may find it necessary to give.

Sphere of provincial autonomy

The Act also defines the sphere within which provincial autonomy is to be operative. It distributes legislative power between the Federal and the Provincial Legislatures respectively, and defines the central

[1] See W.P., Intr. 6.

[2] See s. 2 and notes thereto.

[3] Par. 48.

[4] See ss. 54 and 123.

and provincial spheres of government by reference to this distribution. In List II of the Seventh Schedule are set out the matters with respect to which the Provincial Legislatures are to have exclusive legislative powers, and the sphere of provincial autonomy in effect comprises all the subjects in the list. There is, however, another list (being List III of the Seventh Schedule) with respect to which the Federal Legislature has a power of legislating concurrently with the Provincial Legislatures, with power of appropriate provision for resolving a conflict of laws. One consequence of this division of legislative powers is that power is conferred on the Governors of Provinces (and not on the Governor-General) to legislate in emergency by ordinance on provincial matters.

The Act vests the whole executive power and authority of the Provinces, which is co-extensive with its legislative power, in the Governor as the representative of the King, and it provides the Governor with a council of ministers to aid and advise him in the exercise of any powers conferred on him by the Act. The ministers, who may not be officials and will be elected or nominated members of the Legislature, will possess the constitutional right to advise the Governor over practically the whole of the provincial sphere (save in respect of those functions which he is required under the Act to exercise in his discretion), subject to the overriding power in the Governor in the field of special responsibilities. The Secretary of State thus visualized the working of the constitution in a Governor's Province in this sphere :

> I imagine the Governor will keep in very close touch with what is happening over the field of the provincial administration. He will have at his disposal the officials to advise him but what is much more important, I am contemplating that he will keep in very close touch with his ministers and that there will not be the gulf between them—one side going one way and the other side the other—but that the Governor will be keeping in very close touch with them and that he will know some time in advance before a situation arises in which it might be necessary for him to exercise his special responsibilities, and I believe in that case if the Governor is a sensible person, and if the ministers are sensible persons—and we have after all to assume a certain measure of commonsense in any proposal that we make—what the Governor would then do would be to talk over the situation with the appropriate minister and if necessary, with the Cabinet and to get the Cabinet so to act as to prevent that situation arising at all. I believe, myself, in 99 cases out of 100, as a result of that kind of consultation and co-operation, the situation will not arise at all under which the Governor would have to intervene. If the situation does arise, then, the Governor will have to take what action he thinks fit. He will have to give his direction to the ministry and if there is then a cleavage, it may lead to the minister's resignation or dismissal. It may lead eventually to the Government resigning, to an election taking place and eventually to a breakdown of the constitution altogether and of the resumption by the Governor of full powers ; but I believe myself that that kind of contingency is very unlikely to happen. If it does happen, we have given both the Governor-General and the Governor full powers ; but I believe myself that that kind of contingency is very unlikely to happen. But we rely very much upon a system of co-operation growing up between the Governor and his ministers, under which the ministers, under their own initiative,

will take such action as to make it unnecessary for the Governor to intervene, under his special responsibilities at all.

Governor's powers

The powers of the Governor under the Act may be summarized as follows:

(1) Powers with regard to 'excluded areas' which are analogous to the reserved departments of the Governor-General, and 'partially excluded areas'.
(2) Powers under his 'special responsibilities'.
(3) Discretionary powers.
(4) Powers to override Legislatures.
(5) Powers of promulgating ordinances.
(6) Powers of withholding assent to Bills passed by the Legislature or reserving them for the consideration of the Governor-General.
(7) Powers of refusing assent to the introduction of certain classes of measures in the Provincial Legislature.
(8) Powers of taking over the administration of certain subjects from the control of the ministers.
(9) Various other special powers such as are referred to in ss. 56 and 58.

The Governor may exercise some of these powers without reference to the ministers, while in exercise of the other powers vested in them, he may act in opposition to their advice. The powers and responsibilities of the Governor are almost identical with those of the Governor-General. The Joint Select Committee have emphasized that the special powers of the Governor are real, and are intended to be exercised if the situation so demands. The safeguards under the head of 'special responsibilities' are not merely paper safeguards.

New Provinces: Under the old Act, there were eight Provinces known as 'Governor's Provinces'.[1] In the new Act, three more Provinces have been added, namely the North-West Frontier Province, Orissa and Sind. Under s. 15 of the old Act, the Governor-General could, after getting the opinion of the local Government and of the local Legislature affected and with His Majesty's sanction, constitute a new Governor's Province. The Joint Select Committee in their first Report on the old Government of India Bill (1919), remarked on the clause in the Bill subsequently enacted as s. 15 of the old Act as follows:

They are of opinion that any clear request made by a majority of the members of a Legislative Council representing a distinctive racial or linguistic territorial unit for its constitution under this clause as a sub-province or a separate Province should be taken as a *prima facie* case on the strength of which a commission of enquiry might be appointed by the Secretary of State, and that it should not be a bar to the appointment of such a commission of enquiry that the majority of the Legislative Council of the Province in question is opposed to the request of the minority representing such a distinctive territorial unit.

Presumably the same principle will be applied to the creation of a new Province under s. 290 of the new Act. The Joint Parliamentary Committee refer to the possibility of a future revision on adjustment

[1] See s. 46(1).

of provincial boundaries.[1] They suggest that although the actual alteration of boundaries should be carried out by Order in Council, the initiative should come from the Provinces concerned and should receive the concurrence of the central Government and Legislature. They think that the power to create a new Governor's Province should be reserved to the Crown and to Parliament, but that appropriate provision should be made to ensure that the Provinces affected and the central Government are given adequate opportunities to express their views.

Under s. 290 of the Act, His Majesty may by Order in Council create a new Province, or diminish or alter the area or the boundaries of any Province. But previous to any such Order in Council being issued, the views of the Federal Government, of the Federal Legislature, of the Government and the Legislature of the Province affected will have to be ascertained.

Sind and Orissa

In the White Paper,[2] the creation of two new Provinces was proposed, Sind and Orissa, the former being carved out of the Bombay Presidency and the latter mainly out of the Provinces of Bihar and Orissa but also including a portion of what is now Madras territory and a very small area from the Central Provinces. The matter is discussed by the Joint Parliamentary Committee;[3] as also the estimated cost of creation of these Provinces.[4]

Sind: Regarding the constitution of Sind as a separate Governor's Province, the Joint Parliamentary Committee[5] quote from the Simon Commission Report, Vol. II, paragraph 38, and discuss the difficulties of the scheme and the objections raised. Their conclusion is that the constitution of Sind as a separate Governor's Province is the best solution possible and that the Hindus in Sind should be allotted a considerable proportion of the seats in the Legislature and should of course enjoy the protection of the special safeguards for minorities applicable in the case of minorities in other Provinces. Sind has been constituted as a Governor's Province from 1 April 1937 by the Government of India (Constitution of Sind) Order, 1936.[6]

North-West Frontier Province: For the recent constitution of this Province, see notes to s. 8.

Orissa: The Joint Parliamentary Committee[7] discuss the question of the constitution of Orissa as a Governor's Province. The union between Orissa and Bihar was characterized by the Simon Commission Report as 'a glaring example of the artificial connexion of areas which are not naturally related'.[8] The Committee thought that the main difficulty was a financial one, since Orissa was, and may well remain, a deficit area. But a separate Province of Orissa would perhaps be the most homogeneous Province in the whole of British India, both racially and linguistically, and the communal difficulty was practically non-existent.

Orissa has been constituted as a Governor's Province from 1 April 1937 by the Government of India (Constitution of Orissa) Order, 1936.[9]

Burma: In 1886, Upper Burma was by Proclamation annexed to the British Crown, and in 1897, Upper and Lower Burma were constituted as a single Lieutenant-Governorship with a Provincial

[1] Report, par. 62.
[2] Intr. par. 45, Prop. par. 61.
[3] Report, pars. 57–60.
[4] Report, pars. 268 (Sind) and 269 (Orissa).
[5] Report, par. 58.
[6] See notes under s. 289.
[7] Report, pars. 60 and 269.
[8] Vol. II, par. 38.
[9] See notes under s. 289.

Government and a Legislative Council consisting (since 1920) of 30 members, two elected by the European Chamber of Commerce, and the Rangoon Trades Association, and twenty-eight (including twelve officials) nominated by the Lieutenant-Governor. From January 1923, Burma was constituted a Governor's Province with a reformed Legislative Council and a dyarchical system similar to that prevalent in other Provinces. The Joint Parliamentary Committee in paragraphs 418–22 discuss the question of the separation of Burma from India and they endorse the recommendation of the Simon Commission [1] that Burma should be forthwith separated from India. In paragraph 434 of their Report, the Joint Parliamentary Committee say that the difficulty of regulating the economic relations of India and Burma in the period immediately following separation presented itself to them as the most serious obstacle to their recommending in favour of separation, which on all other grounds seemed plainly to be indicated. The Committee were much impressed by the views of the delegates representing commercial interests, both European and Indian, on the disturbance of Indo-Burma trade which might result from separation. But the Committee thought that a trade agreement between the two countries, as suggested by them in paragraphs 428–33 of their Report, would enable both India and Burma to tide over the critical period; so they recommend that the separation of India from Burma should be effected simultaneously with the introduction of the constitutional changes proposed by them in the case of the other Provinces of India.

For commercial relations between India and Burma after separation see the Report of the Joint Parliamentary Committee, paragraphs 423–34 and Burma Act, ss. 34–7.

By s. 159 of the Burma Act, that Act is to come into force on such date as His Majesty in Council may appoint under the Government of India Act, 1935, as the date of the commencement of Part III of that Act. This date, as laid down in s. 320(2) of the India Act, is the date on which this latter Act, except Part II thereof, shall come into force as appointed by His Majesty in Council. By the Government of India (Commencement and Transitory Provisions) Order, 1936, the first day of April 1937 was appointed as the date of the commencement of Part III of the India Act.

For provisions as to relation of the Burma monetary system with India, see s. 158; as to customs duties on India-Burma trade, see s. 160. For relief in respect of income taxable both in India and in Burma, see s. 159.

Berar

This territory forms part of the Dominions of H.E.H. the Nizam of Hyderabad, but since 1853 it has been under British administration, and in 1902 it was made the subject of a perpetual lease granted by the Nizam. It is administered with, but not as a part of, the Central Provinces. The people of Berar elect a certain number of representatives who are then formally nominated as members of the Central Provinces Legislature, and legislation both of that Legislature and of the central Legislature is applied to the Berars through the machinery of the Foreign Jurisdiction Act. The Joint Parliamentary Committee [2] say that an arrangement has been made between the Government of India and H.E.H. the Nizam whereby, without derogation from his sovereignty, Berar is to be administered

[1] Report, Vol. II, par. 224.

[2] Report, par. 61.

as part of a Governor's Province to be known as the Central Provinces and Berar, when provincial autonomy under the new Act is established. S. 47, however, provides that if an agreement between His Majesty and H.E.H. the Nizam, as contemplated, is not concluded, or if concluded, is terminated, then Berar will drop out of the scheme and the Central Provinces will alone constitute the Province.

To meet criticism regarding the apportionment of expenditure between the Central Provinces and Berar, the Joint Parliamentary Committee proposed that the Governor of that joint Province should have imposed upon him the special responsibility of seeing that a reasonable share of the revenues raised for the joint purposes of Berar and the Central Provinces should be spent for Berar. This suggestion has been incorporated in s. 52(2), and in the Instrument of Instructions to the Governor of the Central Provinces and Berar.

The agreement contemplated in section 47 has been made on 24 October 1936 between His Majesty the King and His Exalted Highness the Nizam of Hyderabad, and published in a *Gazette of India Extraordinary* dated 13 November 1936. By it His Majesty recognizes and reaffirms the sovereignty of the Nizam over Berar and will continue to pay the sum of 25 lakhs of rupees a year. The Nizam, subject to the agreement, accedes to the Federation of India in respect of Berar. The Central Provinces and Berar are to be administered together as if they were one Province to be known as the Central Provinces and Berar. The Governor of the Province is to be appointed by His Majesty after consultation with the Nizam. The Nizam will have the right to maintain an agent at the seat of the Government of the Province. If the Government of India Act, 1935, be so amended as to be inconsistent with the agreement, or as to alter any of the provisions of the Act mentioned in the schedule to the agreement in a manner not acceptable to the Nizam, he may, by giving notice within six months of the amendment, determine the agreement. The agreement is to have force whether the Nizam enters the Federation or not. In a letter dated 26 October 1936 from the Viceroy to the Nizam, it is stated that should the agreement come to an end, His Majesty the King, pending any new agreement that may be made, may make such arrangements as he may think desirable for the administration of Berar, and may exercise full and exclusive jurisdiction therein; but in no event will the recognition of the Nizam's sovereignty over Berar, or the payment of the annuity of 25 lakhs of rupees, or the existing military guarantees be affected.

For transitory provisions, see the Government of India (Commencement and Transitory Provisions) Order, 1936—paragraph 4—election; 5—authorization of expenditure by Governor before the first Budget under the new Act; 6—Continuation of taxes by Governor.

Governors' Provinces

46.—(1) Subject to the provisions of the next succeeding section with respect to Berar, the following shall be Governors' Provinces, that is to say, Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces and Berar, Assam, the North-West Frontier Province, Orissa, Sind, and such other Governors' Provinces as may be created under this Act.

(2) Burma shall cease to be part of India.

(3) In this Act the expression 'Province' means unless the context otherwise requires, a Governor's Province, and 'Provincial' shall be construed accordingly.

See Introduction to this Chapter; also the Government of India (Constitution of Sind) Order, 1936 and the Government of India (Constitution of Orissa) Order, 1936. For the constitution of Sind and Orissa, see notes under s. 289.

47. Whereas certain territory (in this Act referred to as 'Berar') is under the sovereignty of His Exalted Highness the Nizam of Hyderabad, but is at the date of the passing of this Act, by virtue of certain agreements subsisting between His Majesty and His Exalted Highness, administered together with the Central Provinces: Provisions as to Berar

And whereas it is in contemplation that an agreement shall be concluded between His Majesty and His Exalted Highness whereby, notwithstanding the continuance of the sovereignty of His Exalted Highness over Berar, the Central Provinces and Berar may be governed together as one Governor's Province under this Act by the name of the Central Provinces and Berar:

Now, therefore,—

(1) While any such agreement is in force—

(*a*) Berar and the Central Provinces shall, notwithstanding the continuance of the sovereignty of His Exalted Highness, be deemed to be one Governor's Province by the name of the Central Provinces and Berar;

(*b*) any reference in this Act or in any other Act to British India shall be construed as a reference to British India and Berar, and any reference in this Act to subjects of His Majesty shall, except for the purposes of any oath of allegiance, be deemed to include a reference to Berari subjects of His Exalted Highness;

(*c*) any provision made under this Act with respect to the qualifications of the voters for the Provincial Legislature of the Central Provinces and Berar, or the voters for the Council of State, shall be such as to give effect to any provisions with respect to those matters contained in the agreement:

(2) If no such agreement is concluded, or if such an agreement is concluded but subsequently

ceases to have effect, references in this Act to the Central Provinces and Berar shall be construed as references to the Central Provinces, and His Majesty in Council may make such consequential modifications in the provisions of this Act relating to the Central Provinces as he thinks proper.

See Introduction to this Chapter under THE BERARS. For expenditure of money for the benefit of Berar, see s. 52(2). The agreement contemplated in this section has been made on 24 October 1936 between His Majesty the King and His Exalted Highness the Nizam. See Introduction to this Chapter under BERAR.

CHAPTER II

THE PROVINCIAL EXECUTIVE

INTRODUCTION

The position of the provincial executive is very similar to that of the federal executive.[1] There is provincial autonomy. The Governor, like the Governor-General,[2] is appointed by a commission under the Royal Sign Manual. The executive authority of the Province is to be exercised on behalf of His Majesty by the Governor.[3] As in the Federation, the executive authority of the Province extends to matters in respect of which the Provincial Legislature has power to make laws.[4] As in the Federation [5]—so in the Province there is to be a council of ministers, but the number is not fixed to a maximum of ten as in the Federation.[6]

Relation between the Governor and the Governor-General [7]

The Governor in so far as he is required to act in his discretion or to exercise individual judgement, is under the general control of the Governor-General.[8]

Ministers

The position of the Governor *vis a vis* the ministers is similar to that of the Governor-General.[9]

Special responsibility

The Governor's special responsibilities are similar to those of the Governor-General.[10] But the Governor has special responsibility for the peace and good government of partially excluded areas and he has the power to make regulations for the peace and good government of such areas, which have to be approved by the Governor-General.[11] He has special responsibility for Berar and Sind.[12] But the Governor's special responsibility does not cover the safeguarding of the financial stability and credit of the Provincial Government, unlike that of the Governor-General under s. 12(1)(*b*) for the Federal Government. The reason for this difference is explained by the Joint Parliamentary Committee.[13] They adopted the view of the Statutory Commission [14] that the power of intervention given to the Governor over so wide a field would hinder the growth of responsibility. The Governor will have adequate power in relation to supply and taxation to ensure that the due discharge of his responsibilities is not impeded by lack of financial resources.[15] Under s. 82, no financial Bill can be introduced or moved except on the recommendation of the Governor. S. 79(3) provides that no demand for grant

1 See Part II, Chapter II, Introduction. 2 See s. 3(1).
3 Cf. s. 7. 4 Cf. s. 8(1)(*a*). 5 See s. 9.
6 As to the constitutional position of the Governor, see Introduction to Part II, Chapter II under Powers of the Governor-General; Governor-General and his Ministers : Special Responsibility : In his discretion : In his individual judgement.
7 See Part II, Chapter II, Introduction under this head.
8 See ss. 54 and 123. 9 See ss. 9-10, and notes thereto.
10 See s. 12. 11 See ss. 92-3. 12 See s. 52(3).
13 Report, par. 84. 14 Report, Vol. II, par. 189. 15 See s. 80.

is to be made except on the recommendation of the Governor. But the addition of a special financial responsibility would unduly increase the range of the Governor's special power. Further, the Federation, through their power of control over provincial borrowing,[1] check provincial improvidence.

Instrument of Instructions

Previous to the new Act, Instructions to the Governors were issued by His Majesty but under the old law, there was no statutory rule about such issue. In the new Act, the issue of Instruments of Instructions to the Governor-General as well as to the Governors has been laid down by ss. 13 and 53. The draft of such Instructions (including subsequent amendments) proposed to be recommended to His Majesty for issue to the Governor-General or the Governor is to be laid by the Secretary of State before Parliament and is to be approved of by Parliament. An opportunity is thus given, as the Joint Parliamentary Committee[2] remark, to Parliament of expressing its opinion upon it before the Instrument is finally issued by the Crown. In no other way can Parliament so effectively exercise an influence upon Indian constitutional development. The Joint Parliamentary Committee stress the vital importance of the Instrument of Instructions in the evolution of the new Indian constitution. Thus ministers at first would not have the right to tender advice upon matters left by the Act to the Governor's (or the Governor-General's) discretion ; but he would doubtless often consult them before coming to a decision. If at some future time, having regard to the growth of the spirit of the constitution, it was felt that this power of consultation might safely be made mandatory and not permissive, the necessary amendment in the Instrument of Instructions could be made. It would be neither wise nor safe to deny Parliament a voice in the determination of progressive stages in the evolution of the Indian constitution. In the words of the preamble to the 1919 Act, which forms part of the new Act, 'the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian peoples'. The provision for the gradual evolution of the Indian constitution without actual amendment of the Act is a wise one. But the initiative in proposing any change in the Instrument must, as the Joint Parliamentary Committee point out, necessarily come from the Crown's advisers. But Parliament, on whom rests the final responsibility, must be allowed a prior right of intervention before the amendment proposed is finally made.

The Draft Instrument of Instructions (presented to Parliament by the Secretary of State for India by command of His Majesty in February 1935) for the Governor-General and the Governor, are very similar *mutatis mutandis*. Reference may be made to the old instructions to the Governor and the Governor-General.

Police

The Governor has a special responsibility to prevent any grave menace to the peace or tranquillity of the Province or any part thereof.[3] So he will be entitled to intervene immediately if by reason of ill-timed measures of economy or attempted exertion of political pressure on the police force or from any other cause, the efficiency of the force is endangered. The Joint Parliamentary Committee[4] refer to the body of regulations known as the 'Police Rules'. These are constantly amended on the responsibility

[1] See s. 163.
[2] Report, par. 76.
[3] See s. 52(1)(*a*).
[4] Report, par. 93.

of the Inspector-General of police. It is necessary to require the Governor's consent to every such amendment. But the subject-matter of some of the rules is so vital to the well-being of the police force that they ought not to be amended without the Governor's consent; and similarly with regard to the various police Acts under which the police rules have been framed. The Joint Parliamentary Committee thought it desirable to ensure that the internal organization and discipline of the police should continue to be regulated by the Inspector-General and to protect both him and the minister in charge of Law and Order from political pressure. So in s. 56 it is provided that the making, alteration on amendment of police rules and regulations should be done by the Governor in the exercise of his individual judgement, after consulting his ministers. (The Joint Parliamentary Committee recommended that this should be done by him *in his discretion*). Regarding legislation seeking to amend or repeal any of the (provincial) police Acts, this is not covered by s. 56, but the Governor can, under s. 86(2), stop the introduction or discussion of any such measure in the Legislature, if he in his discretion certifies that the measure would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquillity of the Province or any part thereof.

Special powers to combat terrorism

The Joint Parliamentary Committee [1] deal with the question of arming the Governor with powers which will ensure that adequate and prompt measures are taken to deal with terrorism and other revolutionary activities. In addition to the Governor's special responsibility for the prevention of any grave menace to peace and tranquillity, he must be provided with special power, which he may exercise at his discretion, in case he is of opinion that peace and tranquillity are endangered by the activities, overt or secret, of persons committing crimes of violence intended to overthrow the Government. He is empowered in these circumstances to assume charge to such extent as he may deem requisite, of any branch of government which he thinks it necessary to employ, to combat such activities or if necessary, to create new machinery for the purpose. In these cases, the Governor is further authorized, at his discretion, to appoint an official as temporary member of the Legislature to act as his mouthpiece in that body, such official having all the rights of an elected member except that of voting.[2] In the exercise of this discretionary power, the Governor will, under s. 54, be under the superintendence and control of the Governor-General and ultimately of the Secretary of State for India. The Joint Parliamentary Committee [3] remark that, if conditions in Bengal at the time of the inauguration of provincial autonomy have not materially improved, it would be essential that the Governor of Bengal should exercise the above special powers forthwith and should be directed to do so in his Instrument of Instructions which direction would remain in force until the Instrument is modified with the consent of Parliament.

Secret Intelligence Reports

The Joint Parliamentary Committee [4] refer to the question of protecting officers of the Special Branch of the Criminal Investigation Department whose duty is the collection and sifting of information on which the executive police action against terrorism is taken. They point out that the work of the Special Branch involves the employment of confidential

[1] Report, par. 96.
[2] See s. 57.
[3] Report, par. 96.
[4] Report, pars. 94-95.

informants and agents and the sources of information would at once dry up if their identity is known or liable to become known outside the Special Branch. The Joint Committee think it essential that the secret intelligence reports should be protected from any possible danger of leakage. It is stated that in England the practice is that in a Secret Service case, the names are not disclosed even to the minister immediately concerned. The Committee recommend that the Instrument of Instruction to Governors should specifically require them to give directions that no records relating to intelligence affecting terrorism should be disclosed to anyone other than such persons within the provincial police force as the Inspector-General may direct or such other public officers outside that force as the Governor may direct. They further recommend that the Act should contain specific provisions giving legal sanction for such directions in the Instrument of Instructions. S. 58 of the Act incorporates these recommendations.

The rules are practically the same as the old constitutional practice.

Conduct of business of Government

The secretaries to the Government (specially members of the Indian Civil Service) enjoy the right of direct access to the Governor for the purpose of discussing matters which they think should be brought to his attention. But under the new constitution the council of ministers will advise the Governor and so he can no longer be advised directly and independently by the secretaries. This, the Joint Committee [1] think undesirable. The Governor must in their opinion, have the right to send for, and see, any officer of his Government at any time. The secretaries should not be deprived of access to the Governor or prevented from submitting to him such papers as in their opinion he should see. The Committee therefore recommend that the Act should provide that the rules of business should have a provision requiring the ministers to bring to the Governor's notice any matter pending in their department which involves or is likely to involve any of his special responsibilities; and requiring the secretaries to bring to the notice of the minister and of the Governor any matter of the same kind : s. 59(4) of the Act incorporates these recommendations in a somewhat more comprehensive form as the ministers and secretaries are required to transmit to the Governor all information that may be specified by rules, and not merely information about matters involving or likely to involve any of his special responsibilities.

By par. VIII of the Draft Instrument of Instructions to the Governor,

Cabinet responsibility

he is required, like the Governor-General, to use his best endeavours in consultation with the person who, in his judgement, is likely to command a stable majority in the Legislature, to appoint as ministers those persons (including so far as practicable members of important minority communities) who will best be in a position collectively to command the confidence of the Legislature, and he is to bear in mind the need of fostering a sense of *joint or collective responsibility* among his ministers. In the Report of the Joint Parliamentary Committee [2] the difficulties created by communal representation in the ministry are pointed out. The ministry may be a composite one. The ministry here, unlike that in England, will be the representative not merely of a single majority party or a coalition of parties, but also of the minorities as such. Collective responsibility of the ministers cannot be effective when there is communal

[1] Report, pars. 99-100.

[2] 112-13.

representation in the Cabinet where there may be representation of minorities as such. Further, the system of communal representation, as the Joint Parliamentary Committee point out, may tend to render less effective the weapon of dissolution which under most parliamentary constitutions is resorted to by the executive when confronted by an obstructive legislature, for under such a system, even a general election may well produce a legislature with the same complexion as its predecessor. Ministerial responsibility is not the same thing as Cabinet responsibility. In one sense, the two principles are really opposed. In America, the President's ministers are responsible and liable to impeachment, but they are not collectively responsible. But in England, the ministers are both legally responsible for their individual acts and politically responsible for their collective advice. The collective responsibility of the Cabinet as a whole is a peculiar feature of the English constitution and that system is sought to be introduced in the Indian constitution by the rule that the Governor-General (or the Governor) is to send for the person who in his judgement is likely to command a stable majority in the Legislature and in consultation with him (the Chief Minister) is to appoint as ministers those persons (including members of important minority communities so far as is practicable) who are likely collectively to command the confidence of the Legislature. The Chief Minister approximates to the position of the Prime Minister in England.[1]

Cabinet Government

In England, as Mr Gladstone has put it, the Cabinet is the three-fold hinge which connects together for action the British constitution of the King or Queen, Lords and Commons:

> It is perhaps the most curious formation in the political world of modern times, not for its dignity but for its subtlety, its elasticity and its many-sided diversity of power . . . It lives and acts simply by understanding without a single line of written law or constitution to determine its relations to the Monarch or to the Parliament, or the Nation; or the relation of its members to one another or to their head.

As Marriott remarks[2] the Cabinet system in England involves the acceptance of five principles: close correspondence between the legislature and the executive; the political homogeneity of the executive; the collective responsibility of the members of the Cabinet; the irresponsibility of the Sovereign and his exclusion from the deliberations of the Cabinet; and the common subordination of its members to the leadership of the First Minister. The close correspondence between the Cabinet and the legislature depends upon the party system, the Cabinet being maintained in power by the parliamentary majority. The members of the Cabinet are drawn from a party itself homogeneous. The homogeneity of the Cabinet resulted from the evolution and consolidation of parties. This homogeneity of the Cabinet is well explained by Lord Morley in a classical passage as follows:

> As a general rule, every piece of departmental policy is taken to commit the entire Cabinet and its members stand or fall together. The Chancellor of the Exchequer may be driven from office by a bad dispatch from the Foreign Office, and an excellent Home Secretary may suffer for the blunders of a stupid Minister of War. The Cabinet is a unit—a unit as regards the Sovereign and a unit as

1 See Appendix II.

2 *Op. cit.*, Vol. II, p. 58.

regards the legislature. Its views are laid before the Sovereign and before Parliament, as if they were the views of one man .... The first mark of the Cabinet, as that institution is now understood, is united and indivisible responsibility.

As Mr Gladstone put it, 'while each minister is an adviser of the Crown, the Cabinet is a unity, and none of its members can advise as an individual, without, or in opposition, actual or presumed to, his colleagues'.

The fourth principle of Cabinet Government in England is the irresponsibility of the Sovereign and his exclusion from the deliberations of the Cabinet. Under the Indian constitution, the Governor-General (or the Governor) is the representative of the Sovereign and exercises on behalf of His Majesty the executive authority of the Federation (or of the Province). He represents His Majesty as member of the Legislature. He is immune from all proceedings in any court in India, whether in his personal capacity or otherwise: see s. 306. Thus, like the King, he can do no wrong. He may be present at Cabinet meetings and preside there: see ss. 9(2) and 50(2). The council of ministers is to aid and advise him. Under the old law, the Governor-General (or the Governor) was the president of every Cabinet meeting. Under the new Act, he may preside at meetings of the council of ministers. There is thus a difference, and a time may come when the Governor-General (or the Governor) may cease to attend Cabinet meetings, leaving the ministers the full responsibility of carrying on the administration, as in England. In course of time, the Chief Minister, may, like the Prime Minister in England, preside over the Cabinet meetings. In England the Premier is, in Lord Morley's words, 'the keystone of the Cabinet arch'. Just as the keystone holds the arch together, the arch maintains the keystone in position. As Mr Gladstone speaking of the unique position of the Prime Minister remarked, 'Nowhere in the wide world does so great a substance cast so small a shadow; nowhere is there a man who has so much power with so little to show for it in the way of formal title or prerogative'. Backed by a stable and substantial majority in Parliament, his power is greater than that of the German Emperor or the American President for he can alter the laws, he can impose taxation and repeal it and he can direct all the forces of the state. As Sir Sydney Low observed,[1] as long as he can keep his majority, it is proof that the nation is willing to continue the plenary authority with which he has been invested. The Prime Minister in England is the chairman of the Cabinet; he is the leader in Parliament; he is indirectly the nominee of the electorate, the political sovereign; and he is the confidential adviser of the Crown and the ordinary channel of communication between the Crown and the Cabinet. As the Cabinet stands between the Sovereign and the Parliament, and is bound to be loyal to both, so he stands between his colleagues and the Sovereign and is bound to be loyal to both.

The provisions in the new Act in ss. 9 and 50 and paragraph VIII of the Governor-General's (and the Governor's) Instrument of Instructions seem to imply that the ideal aimed at is the establishment of a system of Cabinet Government somewhat similar to that in England. The Governor-General (or the Governor) is to send for a man who will be the Chief Minister and who will advise him as to the other persons to be chosen as ministers. The Governor-General is to bear constantly in mind the need for fostering a sense of joint responsibility among his

[1] Quoted in Marriott, *op. cit.*, Vol. II, p. 77.

ministers. Thus Cabinet responsibility is sought to be introduced in the new constitution. As the system develops and ministers form a homogeneous unit and act as a whole, gradually the Governor-General may withdraw from attending the Cabinet meetings and the Chief Minister may be fittingly called upon to shoulder the responsibilities, and exercise powers, similar to those of the English Prime Minister.[1]

At present, there is an entire absence of the party system in India as pointed out by the Joint Parliamentary Committee.[2] At the outset, there is not much likelihood of there being a united Cabinet, and the direction and the guidance of the Governor-General (or the Governor) will be necessary. But the difficulties pointed out in the last paragraph may well be resolved in course of time when the ministers realize the constitutional position and the need of acting as a body. Then the Governor-General, like the King in England, may well cease to attend Cabinet meetings, leaving the Chief Minister to carry on the business of Government.

Dominion Status

By the amendment of the Instrument of Instructions, by the gradual establishment of the system of Cabinet responsibility and of the status of the Chief Minister approximating to that of the Prime Minister in England, by the relaxation of control by the Secretary of State under s. 14, by the diminution of the power of the Secretary of State over appointments to the reserved posts (see ss. 244 and 246), by the Secretary of State or the Governor-General respectively consenting under s. 267, Prov. (*b*) to the Federal or the provincial Legislature dealing, through the Public Service Commission, with appointments to a service or a post which may, under this Act, be made by the Secretary of State or the Governor-General, by the vesting by Parliament of the power to make such appointments in the Governor-General or the Governor under s. 244(2), by the greater Indianization of the Services possible by rules under s. 246, it may be possible, without the amendment of the Act, for India to attain the position of the Dominions. The new Act contains within itself the germs for the future development of the constitution, and for the attainment of full Dominion Status.

The Governor

Appointment of Governor

48.—(1) The Governor of a Province is appointed by His Majesty by a Commission under the Royal Sign Manual.

(2) The provisions of the Third Schedule to this Act shall have effect with respect to the salary and allowances of the Governor and the provision to be made for enabling him to discharge conveniently and with dignity the duties of his office.[3]

Cl. (2): The salary and allowances of the Governor are charged on the revenues of the Province. See s. 78(3) (*a*); they cannot even be discussed in the Legislature, see s. 79(1).

1 See s. 52, notes and Appendix II.

2 Report, par. 112.

3 See s. 3(1) for the appointment of the Governor-General. ROYAL SIGN MANUAL: See notes under s. 3(1) under this heading.

Executive authority of Province

49.—(1) The executive authority of a Province shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal or the Provincial Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor any functions conferred by any existing Indian law on any court, judge, or officer or any local or other authority.

(2) Subject to the provisions of this Act, the executive authority of each Province extends to the matters with respect to which the Legislature of the Province has power to make laws.

For the executive authority of the Federation, see s. 7(1), and Introduction to Part II, Chapter II, and Introduction to this Chapter.

Administration of Provincial Affairs

Council of ministers

50.—(1) There shall be a council of ministers to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion:

Provided that nothing in this subsection shall be construed as preventing the Governor from exercising his individual judgment in any case where by or under this Act he is required so to do.

(2) The Governor in his discretion may preside at meetings of the council of ministers.

(3) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Act required to act in his discretion or to exercise his individual judgment, the decision of the Governor ... 'iscretion shall be final, and the validity of anything ... the Governor shall not be called in question on the ... that he ought or ought not to have acted in his ...on, or ought or ought not to have exercised his ...al judgment.[1]

...he Federal Executive, the presence of the Governor-General at ... of the Cabinet will be very useful; for there is dyarchy in the

[1] ... J.C.R. 85–8: and Introduction to this chapter, specially under CABINET ...BILITY. See also s. 9 (Federal Ministry) and notes thereto, and ...ion to Part II, Chapter II under GOVERNOR-GENERAL AND MINISTERS: ...IENT OF MINISTERS: SALARY OF MINISTERS. For the meaning of the ...IN HIS INDIVIDUAL JUDGEMENT: IN HIS DISCRETION, see Introduction ...I, Chapter II under these headings.

centre, and the joint deliberations of the ministers with the counsellors and the financial adviser will be greatly facilitated thereby. In the Provincial Government, however, the presence of the Governor at the Cabinet meetings may in course of time, prevent the growth of a homogeneous Cabinet and of Cabinet responsibility. As pointed out in the Introduction to this Chapter under CABINET GOVERNMENT, one of the principles underlying the formation of Cabinet Government in England is the irresponsibility of the King and his exclusion from the Cabinet. The fact that the King ceased to attend the Cabinet meetings meant that the ministers discussed matters at Cabinet meetings freely without being overawed or influenced by the King. This led to the formation of a homogeneous Cabinet and the supremacy of the Prime Minister, and thus materially contributed to the establishment of parliamentary government in England.

In Canada, the practice followed was that the recommendations of the Cabinet were forwarded to the Governor in a report which was, when necessary, discussed by him with the First Minister; and when marked 'approved' by the Governor, the recommendations became operative.

Under s. 9, the number of federal ministers cannot exceed ten, but there is no limit in the case of provincial ministers. The matter rests in the discretion of the Governor.

51.—(1) The Governor's ministers shall be chosen and summoned by him, shall be sworn as members of the council, and shall hold office during his pleasure. Other provisions as to ministers

(2) A minister who for any period of six consecutive months is not a member of the Provincial Legislature shall at the expiration of that period cease to be a minister.

(3) The salaries of ministers shall be such as the Provincial Legislature may from time to time by Act determine, and, until the Provincial Legislature so determine, shall be determined by the Governor:

Provided that the salary of a minister shall not be varied during his term of office.

(4) The question whether any, and if so what, advice was tendered by ministers to the Governor shall not be inquired into in any court.

(5) The functions of the Governor under this section with respect to the choosing and summoning and the dismissal of ministers, and with respect to the determination of their salaries, shall be exercised by him in his discretion.

See J.C.R. 73-5; ss. 9, 10 and 50 and notes thereto. The minister holds his office during the Governor's pleasure and may be dismissed by him at any time.

In his discretion: See Introduction to Part II, Chapter II under this heading.

Special responsibilities of Governor

52.—(1) In the exercise of his functions the Governor shall have the following special responsibilities, that is to say:

(*a*) the prevention of any grave menace to the peace or tranquillity of the Province or any part thereof;

(*b*) the safeguarding of the legitimate interests of minorities;

(*c*) the securing to, and to the dependants of, persons who are or have been members of the public services of any rights provided or preserved for them by or under this Act, and the safeguarding of their legitimate interests;

(*d*) the securing in the sphere of executive action of the purposes which the provisions of chapter III of Part V of this Act are designed to secure in relation to legislation;

(*e*) the securing of the peace and good government of areas which by or under the provisions of this Part of this Act are declared to be partially excluded areas;

(*f*) the protection of the rights of any Indian State and the rights and dignity of the Ruler thereof; and

(*g*) the securing of the execution of orders or directions lawfully issued to him under Part VI of this Act by the Governor-General in his discretion.

(2) The Governor of the Central Provinces and Berar shall also have the special responsibility of securing that a reasonable share of the revenues of the Province is expended in or for the benefit of Berar, the Governor of any Province which includes an excluded area shall also have the special responsibility of securing that the due discharge of his functions in respect of excluded areas is not prejudiced or impeded by any course of action taken with respect to any other matter, any Governor who is discharging any functions as agent for the Governor-General shall also have the special responsibility of securing that the due discharge of those functions is not prejudiced or impeded by any course of action taken with respect to any other matter, and the Governor of Sind shall also have the special responsibility of securing the proper administration of the Lloyd Barrage and Canals Scheme.

(3) If and in so far as any special responsibility of the Governor is involved, he shall, in the exercise of his functions, exercise his individual judgment as to the action to be taken.[1]

Cl. (*e*) : Partially excluded areas are defined in s. 91(1). No act of any Legislature is to apply to such area unless the Governor by public notification so directs. Totally excluded areas are placed entirely under the control of the Governor at his discretion.[2]

Cl. (*f*) : With regard to this clause, the Secretary of State made the following observations :

Beyond the questions which arise as between the States and the Governor-General, there may be matters concerning a Province and a State. Suppose, for example, a movement like the non-co-operation movement is raised in a Province and a large body of people march from a Province to a neighbouring State and stir up trouble there, there ought to be power in the Governor to prevent such a movement. A special responsibility is imposed on the Governor to secure that the balance is held evenly between Province and State, with regard to the established rights of either party, and clearly in a matter of this kind, he should be guided by the advice or directions of the Governor-General.[3]

'Rights' referred to herein necessarily mean rights enjoyed by a State not covered by its Instrument of Accession, which may be prejudiced by administrative or legislative action in a neighbouring Province.

Cl. (*g*) : Under s. 123, the Governor-General in his discretion, may direct the Governor to discharge certain functions as his agent. See also s. 126 regarding the control of the Federation over Provinces in certain cases, and the issue of orders by the Governor-General to the Governor.

The reason for the insertion of this clause was thus stated by Sir Samuel Hoare :

As the Governor-General is to be charged with the general superintendence of the actions of Governors in exercise of the special responsibilities and if . . . he is, himself to have imposed upon him a special responsibility for the prevention of grave menace to the peace and tranquillity throughout the country, it follows that he must be in a position to ensure that his instructions to a Governor are acted upon, and consequently that the Governor must be in a position to act otherwise than on his ministers' advice, if such advice conflicts with the Governor-General's instructions.

As the Joint Committee observe[4] :

The Governor-General exercises a wide range of powers in responsibility to the Secretary of State and through him to Parliament. The exercise of some of these powers may from time to time require the co-operation of provincial administrations, and a Governor must be in a position to give effect to any directions or orders of the Governor-General to secure this object, even if their execution may not be acceptable to his ministers.

1 See J.C.R. 78 ; see s. 12—special responsibilities of Governor-General, and notes thereto.

2 See ss. 91-92, see J.C.R. 144.

3 See J.C.R. 80.

4 Report, par. 81.

These include not only the orders issued by the Governor-General in the discharge of his special responsibilities or in fulfilment of functions left to his discretion, but also orders in the federal sphere for which special provisions have been made in the Act. See ss. 123, 126(4).

Cl. (2): Berar and Sind—see ss. 46(1) and 47 and J.C.R. 83, and 82, and Introduction to this Chapter under these headings.

Excluded Areas: see ss. 91 and 92, and notes thereto.

Agent of the Governor-General: see s. 123.

Provisions as to Instrument of Instructions

53.—(1) The Secretary of State shall lay before Parliament the draft of any Instructions (including any Instructions amending or revoking Instructions previously issued) which it is proposed to recommend His Majesty to issue to the Governor of a Province, and no further proceedings shall be taken in relation thereto except in pursuance of an address presented to His Majesty by both Houses of Parliament praying that the Instructions may be issued.

(2) The validity of anything done by the Governor of a Province shall not be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him.[1]

Superintendence of Governor-General

54.—(1) In so far as the Governor of a Province is by or under this Act required to act in his discretion or to exercise his individual judgment, he shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given to him by, the Governor-General in his discretion, but the validity of anything done by a Governor shall not be called in question on the ground that it was done otherwise than in accordance with the provisions of this section.

(2) Before giving any directions under this section, the Governor-General shall satisfy himself that nothing in the directions requires the Governor to act in any manner inconsistent with any Instrument of Instructions issued to the Governor by His Majesty.

Under s. 45 of the old Act, every Provincial Government is to obey the orders of the Governor-General in Council and is under his superintendence, direction and control in all matters relating to the government of the Province; and by s. 45A(3) of that Act, the powers of superintendence, direction and control vested in the Governor-General in Council in relation to transferred subjects, are to be exercised only for such purposes as may be specified by unless made under the Act. The Report

[1] See J.C.R. 76 and Introduction to this Chapter under INSTRUMENT OF INSTRUCTIONS.

of the Joint Parliamentary Committee [1] says that the Governor's responsibility will be in the first instance to the Governor-General acting in his discretion, and through him, to the Secretary of State, and ultimately to Parliament. Compare s. 14 regarding the superintendence of the Secretary of State over the Governor-General. Whether the Governor would have to consult the Governor-General on every occasion, the Secretary of State, in his evidence, made the following observations: 'I think in nine cases out of ten, a convention would grow up under which he would not consult the Governor-General; but technically and constitutionally the Governor-General would give him directions'.

If the Governor-General and the Governor differ in regard to the interpretation of their respective powers, the Governor-General should have the last word.

55.—(1) The Governor of each Province shall appoint a person, being a person qualified to be appointed a judge of a High Court, to be Advocate-General for the Province. Advocate-General for Province

(2) It shall be the duty of the Advocate-General to give advice to the Provincial Government upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor.

(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.

(4) In exercising his powers with respect to the appointment and dismissal of the Advocate-General and with respect to the determination of his remuneration, the Governor shall exercise his individual judgment.[2]

56. Where it is proposed that the Governor of a Province should by virtue of any powers vested in him make or amend, or approve the making or amendment of, any rules, regulations or orders relating to any police force, whether civil or military, he shall exercise his individual judgment with respect to the proposal, unless it appears to him that the proposal does not relate to or affect the organization or discipline of that force.[3] Provisions as to police rules

The following observations have been made by the Joint Select Committee.[4]

1 Par. 110.

2 Cf. s. 16 regarding the Advocate-General for the Federation, and notes thereto. The qualifications of a judge of a High Court are prescribed in s. 220(3). For the Advocate-General's right to take part in the proceedings of the Legislature, see s. 21 (Federal) and s. 64 (Provincial).

3 See Introduction to this Chapter under POLICE and SECRET INTELLIGENCE REPORTS.

4 Report, par. 93.

The due discharge of his special responsibilities for peace and tranquillity will, in itself, entitle the Governor, to intervene immediately if, by reason of ill-timed measures of economy or the attempted execution of political influence on the police force or from any other cause, the morale or the efficiency of that force is endangered. Further, the Governor has another special responsibility: it is his duty to secure to the members of the police, as of other public services, any rights provided for them by the Constitution Act and to safeguard their legitimate interests. These are important safeguards, but there is one element in police administration which requires to be specially protected. We refer to the body of regulations known as the 'Police Rules' promulgated from time to time under powers given by the various police Acts. A large number of the rules deal with matters of quite minor importance and are constantly amended, in practice, on the responsibility of the Inspector-General of Police himself. It would be unnecessary to require the Governor's consent to every amendment of this kind. But the subject-matter of some of the rules is so vital to the well-being of the police force that they ought not, in our opinion, to be amended without the Governor's consent and the same consideration applies *a fortiori* to the Acts themselves, which form the statutory basis of the rules. Our aim is to ensure that the internal organization and discipline of the police continue to be regulated by the Inspector-General and to protect both him and the ministers themselves from political pressure in this vital field. We, therefore, recommend that the prior consent of the Governor, given in his discretion, should be required to any legislation which would amend or repeal the General Police Act in force in the Province or any other police Act (such as the Bombay City Police Act, the Calcutta Police Act, the Madras City Police Act and Acts regulating military police in Provinces where such forces exist). We further recommend that any requirement in any of these Acts that rules made under them shall be made or approved by the local Government is to be construed as involving the consent of the Governor, given in his discretion, to the making or amendment of any rules which, in his opinion, relate to, or affect the organization or discipline of the police. It will be, of course, open to the Governor-General in his discretion to give directions to the Provincial Governor as to the making, maintenance, abrogation or amendment of all such rules.

Provisions as to crimes of violence intended to overthrow Government

57.—(1) If it appears to the Governor of a Province that the peace or tranquillity of the Province is endangered by the operations of any persons committing, or conspiring, preparing or attempting to commit, crimes of violence which, in the opinion of the Governor, are intended to overthrow the government as by law established, the Governor may, if he thinks that the circumstances of the case require him so to do for the purpose of combating those operations, direct that his functions shall, to such extent as may be specified in the direction, be exercised by him in his discretion and, until otherwise provided by a subsequent direction of the Governor, those functions shall to that extent be exercised by him accordingly.

(2) While any such direction is in force, the Governor may authorise an official to speak in and otherwise take part in the proceedings of the Legislature, and any official so authorised may speak and take part accordingly in the proceedings of the Chamber or Chambers of the Legislature, any joint sitting of the Chambers, and any committee of the Legislature of which he may be named a member by the Governor, but shall not be entitled to vote.

(3) The functions of the Governor under this section shall be exercised by him in his discretion.

(4) Nothing in this section affects the special responsibility of the Governor for the prevention of any grave menace to the peace or tranquillity of the Province or any part thereof.[1]

The Joint Parliamentary Committee recommended that the Constitution Act should specifically empower the Governor, at his discretion, if he regarded the peace and tranquillity of the Province as endangered by the activities, overt or secret, of persons committing or conspiring to commit crimes of violence intended to overthrow the Government, and if he considers that the situation cannot otherwise be effectively handled, to assume charge, to such extent as he may judge requisite, of any branch of the Government which he thinks necessary to employ to combat such activities, or, if necessary, to create new machinery for the purpose. The exercise of these powers by the Governor would be subject to the superintendence and control of the Governor-General and ultimately of the Secretary of State.

Cl. (2): For the official's right to speak, etc., see ss. 21 and 64.

58. The Governor in his discretion shall make rules for securing that no records or information relating to the sources from which information has been or may be obtained with respect to the operations of persons committing, or conspiring, preparing, or attempting to commit, such crimes as are mentioned in the last preceding section, shall be disclosed or given— **Sources of certain information not to be disclosed**

(*a*) by any member of any police force in the Province to another member of that force except in accordance with directions of the Inspector-General of Police or Commissioner of Police, as the case may be, or to any other person except in accordance with directions of the Governor in his discretion; or

(*b*) by any other person in the service of the Crown in the Province to any person except in accord-

[1] See Introduction to this Chapter under SPECIAL POWERS TO COMBAT TERRORISM.

ance with directions of the Governor in his discretion.[1]

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59.—(1) All executive action of the Government of a Province shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Provincial Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion.

(4) The rules shall include provisions requiring ministers and secretaries to Government to transmit to the Governor all such information with respect to the business of the Provincial Government as may be specified in the rules, or as the Governor may otherwise require to be so transmitted, and in particular requiring a minister to bring to the notice of the Governor, and the appropriate secretary to bring to the notice of the minister concerned and of the Governor, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor.

(5) In the discharge of his functions under sub-sections (2), (3) and (4) of this section the Governor shall act in his discretion after consultation with his ministers.[2]

Cl. (4): The Joint Parliamentary Committee in their Report[3] thought it essential that the Governor should have at his disposal sufficient information as to the current affairs of the Province to enable him to take timely action in a case where the due discharge of any of his special responsibilities seems to call for his intervention. Under the old constitution, he used to derive a good deal of information on current affairs from the secretaries to Government, almost always members of the Indian Civil Service, who by a long-standing usage enjoyed the right of

[1] See Introduction to this Chapter under POLICE AND SECRET INTELLIGENCE REPORTS.

[2] See s. 17 (Governor-General) and notes thereto, and Introduction to this Chapter under CONDUCT OF BUSINESS.

[3] Pars. 98–100.

direct access to him to discuss cases which in their opinion, merited his personal attention. The Joint Committee thought that the Governor should have the unquestionable right to send for, and see, any officer of his Government at any time, though under the new constitution such communications between the Governor and the secretaries would not occur without the knowledge of the minister concerned.

Under the powers given to the Governor by this section, he might prescribe that orders proposed to be passed by the minister within his sphere on certain specified matters are not to be made unless the decision was initialled by him. This would ensure that the minister gave his advice in those matters after hearing the views of the Governor thereon. The council of ministers will aid and advise the Governor, and he can no longer be advised directly and independently by the secretaries. So the Joint Committee recommended that the rules of business are to contain a provision making it obligatory upon the ministers to bring to the Governor's notice any matter under consideration which involves or is likely to involve any of his special responsibilities; and requiring secretaries to the Government to bring to the notice of the minister and of the Governor any such matters.

The Governor, in acting under this section, is to act in his discretion. Ordinarily when he acts in his discretion, he is in no way bound to consult his ministers (as he is, in matters left to his individual judgement). But it is exceptionally provided in clause (5) of this section that he is to act in his discretion, after consulting his ministers.

CHAPTER III

THE PROVINCIAL LEGISLATURE

INTRODUCTION

The provisions in the chapter regarding Provincial Legislatures are very similar to those regarding the Federal Legislature, in Part II, Chapter III, with some slight differences referred to below.

The Provincial Legislature

The Provincial Legislature is to consist of His Majesty represented by the Governor, and (1) in Madras, Bombay, Bengal, the United Provinces, Bihar and Assam, two Chambers; (2) in the other five Provinces and in Provinces which may be subsequently created, one Chamber. The powers of the Provincial Upper House are not co-extensive with those of the Lower House, unlike the case in the Federal Legislature. It only possesses the power of revision and delay for the purpose of exercising a check on hasty and ill-considered legislation. A Bill introduced in, and passed by, the Legislative Council, but rejected by the Legislative Assembly will lapse. Demands for grants are only submitted to, and considered by, the Lower House, and all financial Bills must be considered by, and voted upon, by it. See Introduction to Part II, Chapter III, under RELATION OF THE TWO HOUSES IN THE PROVINCIAL LEGISLATURE.

For arguments for and against the establishment of an Upper Chamber in a Province, see Introduction to Part II, Chapter III, under SECOND CHAMBER. Under s. 308 of this Act, a Provincial Legislature may, after ten years from the inauguration of provincial autonomy, present an address to the Governor for submission to His Majesty and the Parliament, praying for the establishment or abolition of an Upper Chamber. Under s. 308(4), His Majesty, whether ten years have elapsed or not, whether an address by the Provincial Legislature has been presented or not, may, by Order in Council, establish or abolish an Upper Chamber.

Legislative Councils will be constituted as follows:

Madras 54 to 56 members; Bombay 29 to 30; Bengal 63 to 65; the United Provinces 58 to 60; Bihar 29 to 30; and Assam 21 to 22.

The Legislative Assemblies will be constituted as follows:

Madras 215 members; Bombay 175; Bengal 250; the United Provinces 228; Punjab 175; Bihar 152; Central Provinces 112; Assam 108; N.-W.F. Province 50; Orissa 60; and Sind 60.

The allocation of seats in the Legislative Assembly to the various communities is specified in the Fifth Schedule. Seats have been distributed on the following basis: (a) there are general constituencies and separate communal constituencies (both classed under head territorial constituencies), and special constituencies; (b) in the general constituencies, seats have been reserved for members of the backward classes, and in Bombay for the Mahrathas; the election will be by joint electorates; (c) in five Presidencies, seats have been allotted to representatives of

backward areas and tracts; (*d*) there will be separate communal electorates for Europeans, Sikhs, Moslems and Anglo-Indians, covering between them the whole of the Province; (*e*) in selected areas, there will be separate communal electorates for Indian Christians and women, but in Assam and Bihar women's seats will be non-communal; (*f*) labour seats will be filled up by non-communal constituencies; (*g*) special seats allotted to commerce and industry will be filled up by election by Chambers of Commerce and other similar associations; (*h*) seats reserved for the Universities will be filled up by registered graduates; (*i*) landholders' seats will be filled up by election by special landholders' constituencies.

As in the Federal Legislature, in the Provincial Legislatures seats have not been distributed on the basis of population. In Bengal, out of 250 seats, 34 are for special constituencies; and 216 for territorial constituencies, of which 17 are for Europeans, Anglo-Indians and Indian Christians, leaving 199 seats for Mohammedan and general territorial constituencies; the number of seats assigned to the Europeans, the Anglo-Indians, the Indian Christians and the Mohammedans are not proportionate to their respective numbers. Europeans who number 23,000 out of a total population of 50 millions or ·05%, get 11 seats (territorial). Out of 199 seats, Mohammedans who are about 54% of the population, who would have got about 108 seats on that basis, get 119.

General

60.—(1) There shall for every Province be a Provincial Legislature which shall consist of His Majesty, represented by the Governor, and— Constitution of Provincial Legislatures

(*a*) in the Provinces of Madras, Bombay, Bengal, the United Provinces, Bihar and Assam, two Chambers;

(*b*) in other Provinces, one Chamber.

(2) Where there are two Chambers of a Provincial Legislature, they shall be known respectively as the Legislative Council and the Legislative Assembly, and where there is only one Chamber, the Chamber shall be known as the Legislative Assembly.

Cl. (1): The White Paper proposal was that there should be an Upper Chamber in Bengal, the United Provinces and Bihar. The Joint Committee recommended that there should be Legislative Councils also in Bombay and Madras. This section adds the Province of Assam. As to the utility of Upper Chamber, see Introduction to Part II, Chapter II, under UPPER CHAMBER.

61.—(1) The composition of the Chamber or Chambers of the Legislature of a Province shall be such as is specified in relation to that Province in the Fifth Schedule to this Act. Composition of Chambers of Provincial Legislatures

(2) Every Legislative Assembly of every Province, unless sooner dissolved, shall continue for five years from the date appointed for their first meeting and no longer, and the expiration of the said period of five years shall operate as a dissolution of the Assembly.

(3) Every Legislative Council shall be a permanent body not subject to dissolution, but as near as may be one-third of the members thereof shall retire in every third year in accordance with the provision in that behalf made in relation to the Province under the said Fifth Schedule.

The life of the Legislative Assembly has been extended from three years, as under s. 72B(1) of the old Act, to five. The period cannot be extended. But under old s. 72B(1), Prov. (*b*), the Governor could extend the life of the Legislature. Like the Council of State[1] the Legislative Council is to be a permanent body.

Sessions of the Legislature, prorogation and dissolution

62.—(1) The Chamber or Chambers of each Provincial Legislature shall be summoned to meet once at least in every year, and twelve months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of this section, the Governor may in his discretion from time to time—

(*a*) summon the Chambers or either Chamber to meet at such time and place as he thinks fit;
(*b*) prorogue the Chamber or Chambers;
(*c*) dissolve the Legislative Assembly.

(3) The Chamber or Chambers shall be summoned to meet for the first session of the Legislature on a day not later than six months after the commencement of this Part of this Act.[2]

The first session shall begin within six months from the date of commencement of Part III of this Act. This date is to be fixed by Order in Council as the date when the whole of the Act excepting Part II is to come into force.[3] It is open to His Majesty in Council to fix different dates for the coming into operation of different provisions of this Act (excepting Part II). By the Government of India (Commencement and Transitory Provisions) Order, 1936, the first day of April 1937 was fixed as the date of commencement of Part III of this Act.

[1] See s. 18(4).

[2] See s. 19 (Federal Legislature).

[3] See s. 320(2).

Right of Governor to address, and send messages to, Chambers

63.—(1) The Governor may in his discretion address the Legislative Assembly or, in the case of a Province having a Legislative Council, either Chamber of the Provincial Legislature or both Chambers assembled together, and may for that purpose require the attendance of members.

(2) The Governor may in his discretion send messages to the Chamber or Chambers of the Provincial Legislature, whether with respect to a Bill then pending in the Legislature or otherwise, and a Chamber to whom any message is so sent shall with all convenient dispatch consider any matter which they are required by the message to take into consideration.[1]

Under ss. 63A(3) and 63B(3) of the old Act, the Governor-General had the right of addressing the Council of State and the Legislative Assembly, and might for that purpose require the attendance of the members.[2]

Message: Under s. 75, Prov., the Governor may return a Bill to the Legislature with a message to reconsider it or to consider certain amendments recommended by him. Under s. 76(1), Prov., the Governor-General may direct the Governor to return a Bill with a similar message.

Rights of ministers and Advocate-General as respects Chambers

64. Every minister and the Advocate-General shall have the right to speak in, and otherwise take part in the proceedings of, the Legislative Assembly of the Province or, in the case of a Province having a Legislative Council, both Chambers and any joint sitting of the Chambers, and to speak in, and otherwise take part in the proceedings of, any committee of the Legislature of which he may be named a member, but shall not, by virtue of this section, be entitled to vote.

See s. 21 and notes thereunder.

Officers of Chambers

65.—(1) Every Provincial Legislative Assembly shall, as soon as may be, choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly shall choose another member to be Speaker or Deputy Speaker, as the case may be.

(2) A member holding office as Speaker or Deputy Speaker of an Assembly shall vacate his office if he ceases to be a member of the Assembly, may at any time resign his office by writing under his hand addressed to the Governor, and may be removed from his office by a resolution of the Assembly passed by a majority of all the then members of the Assembly; but no resolution for the purpose of this subsection shall be moved unless at least fourteen

1 See s. 20 (Federal Legislature). 2 See s. 72A(1), old Act (Governor).

days' notice has been given of the intention to move the resolution:

Provided that, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution.

(3) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the Assembly as the Governor may in his discretion appoint for the purpose, and during any absence of the Speaker from any sitting of the Assembly the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the Assembly, or, if no such person is present, such other person as may be determined by the Assembly, shall act as Speaker.

(4) There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly such salaries as may be respectively fixed by Act of the Provincial Legislature, and until provision in that behalf is so made, such salaries as the Governor may determine.

(5) In the case of a Province having a Legislative Council, the foregoing provisions of this section (other than the proviso to subsection (2) thereof) shall apply in relation to the Legislative Council as they apply in relation to the Legislative Assembly, with the substitution of the titles 'President' and 'Deputy President' for the titles 'Speaker' and 'Deputy Speaker' respectively, and with the substitution of references to the Council for references to the Assembly.

The election of the Speaker or of the Deputy Speaker does not require the approval of the Governor as under the old Act.[1] By s. 87 these officers are immune from the jurisdiction of any court in respect of the exercise by them of the powers conferred on them.[2] In the case of the Upper House of any Provincial Legislature, the presiding officers are called President and Deputy President.

They are appointed by a Chamber of the Legislature and not by the Crown in India, see s. 69.

Voting in Chambers, power of Chambers to act notwithstanding vacancies, and quorum

66.—(1) Save as in this Act otherwise expressly provided, all questions in a Chamber, or a joint sitting of two Chambers, of a Provincial Legislature shall be determined by a majority of votes of the members present and voting, other than the Speaker or President, or person acting as such.

[1] See s. 72C(1) and (2), old Act.

[2] See notes to s. 41.

The Speaker or President, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) A Chamber of a Provincial Legislature shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in a Provincial Legislature shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do, sat or voted or otherwise took part in the proceedings.

(3) If at any time during a meeting of a Provincial Legislative Assembly less than one-sixth of the total number of members of the Chamber are present, or if at any time during a meeting of a Provincial Legislative Council less than ten members are present, it shall be the duty of the Speaker or President or person acting as such either to adjourn the Chamber, or to suspend the meeting until at least one-sixth of the members, or, as the case may be, at least ten members, are present.

The Presiding Officer, though member of the House, has only one vote—the casting vote. See s. 23(2)—Federal Legislature and notes thereto.

Provisions as to Members of Legislatures

67. Every member of a Provincial Legislative Assembly or Legislative Council shall, before taking his seat, make and subscribe before the Governor, or some person appointed by him, an oath according to that one of the forms set out in the Fourth Schedule to this Act which the member accepts as appropriate in his case. Oath of members

See s. 24—Federal Legislature.

68.—(1) No person shall be a member of both Chambers of a Provincial Legislature, and rules made by the Governor exercising his individual judgment shall provide for the vacation by a person who is chosen a member of both Chambers of his seat in one Chamber or the other. Vacation of seats

(2) No person shall be a member both of the Federal Legislature and of a Provincial Legislature and if a person is chosen a member both of the Federal Legislature and of a Provincial Legislature, then, at the expiration of such period as may be specified in rules made by the Governor of the Province exercising his individual judgment, that person's seat in the Provincial Legislature shall become vacant, unless he has previously resigned his seat in the Federal Legislature.

(3) If a member of a Chamber—

(*a*) becomes subject to any of the disqualifications mentioned in subsection (1) of the next succeeding section; or

(*b*) by writing under his hand addressed to the Governor resigns his seat,

his seat shall thereupon become vacant.

(4) If for sixty days a member of a Chamber is without permission of the Chamber absent from all meetings thereof, the Chamber may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the Chamber is prorogued, or is adjourned for more than four consecutive days.

See s. 25—Federal Legislature. If a person becomes member both of the Federal and also of a Provincial Legislature, then his seat in the latter is to become vacant after such period as may be prescribed by rules made by the Governor in his individual judgement, unless he has in the meantime resigned his seat in the Federal Legislature. Under s. 93 of the old Act, if a member of any Legislature is for a period of two successive months unable to attend to the duties of his office, the Governor-General (or the Governor, as the case may be) may declare his seat vacant. By Cl. (4) of this section, the Chamber itself can declare the seat vacant.

Disqualifications for membership

69.—(1) A person shall be disqualified for being chosen as, and for being, a member of a Provincial Legislative Assembly or Legislative Council—

(*a*) if he holds any office of profit under the Crown in India, other than an office declared by Act of the Provincial Legislature not to disqualify its holder;

(*b*) if he is of unsound mind and stands so declared by a competent court;

(*c*) if he is an undischarged insolvent;

(*d*) if, whether before or after the commencement of this Part of this Act, he has been convicted or has, in proceedings for questioning the validity or regularity of an election, been found to have been guilty, of any offence or corrupt or illegal practice relating to elections which has been declared by Order in Council, or by an Act of the Provincial Legislature, to be an offence or practice entailing disqualification for membership of the Legislature, unless

such period has elapsed as may be specified in that behalf in the provisions of that Order or Act;

(*e*) if, whether before or after the commencement of this Part of this Act, he has been convicted of any other offence by a court in British India or in a State which is a Federated State and sentenced to transportation or to imprisonment for not less than two years, unless a period of five years, or such less period as the Governor, acting in his discretion, may allow in any particular case, has elapsed since his release;

(*f*) if, having been nominated as a candidate for the Federal or any Provincial Legislature or having acted as an election agent of any person so nominated, he has failed to lodge a return of election expenses within the time and in the manner required by any Order in Council made under this Act or by any Act of the Federal or the Provincial Legislature, unless five years have elapsed from the date by which the return ought to have been lodged or the Governor, acting in his discretion, has removed the disqualification:

Provided that a disqualification under paragraph (*f*) of this subsection shall not take effect until the expiration of one month from the date by which the return ought to have been lodged or of such longer period as the Governor, acting in his discretion, may in any particular case allow.

(2) A person shall not be capable of being chosen a member of a Chamber of a Provincial Legislature while he is serving a sentence of transportation or of imprisonment for a criminal offence.

(3) Where a person who, by virtue of a conviction or a conviction and a sentence, becomes disqualified by virtue of paragraph (*d*) or paragraph (*e*) of subsection (1) of this section is at the date of the disqualification a member of a Chamber, his seat shall, notwithstanding anything in this or the last preceding section, not become vacant by reason of the disqualification until three months have elapsed from the date thereof or, if within those three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of, but during any period during which his membership is preserved by this subsection, he shall not sit or vote.

(4) For the purposes of this section a person shall not be deemed to hold an office of profit under the Crown in India by reason only that he is a minister either for the Federation or for a Province.

See s. 26—Federal Legislature—and notes thereunder.

Corrupt practices and disqualification

By Part IV of the Government of India (Provincial Elections Corrupt Practices and Election Petitions) Order, 1936, disqualification for membership of a Provincial Legislature on account of election offences has been provided.

Penalty for sitting and voting when not qualified, or when disqualified

70. If a person sits or votes as a member of a Provincial Legislative Assembly or Legislative Council when he is not qualified or is disqualified for membership thereof, or when he is prohibited from so doing by the provisions of subsection (3) of the last preceding section, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Province.

See s. 27 and notes thereunder.

Privileges, etc. of members

71.—(1) Subject to the provisions of this Act and to rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in every Provincial Legislature, and no member of the Legislature shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a Chamber of such a Legislature of any report, paper, votes or proceedings.

(2) In other respects the privileges of members of a Chamber of a Provincial Legislature shall be such as may from time to time be defined by Act of the Provincial Legislature, and, until so defined, shall be such as were immediately before the commencement of this Part of this Act enjoyed by members of the Legislative Council of the Province.

(3) Nothing in any existing Indian law, and, notwithstanding anything in the foregoing provisions of this section, nothing in this Act, shall be construed as conferring, or empowering any Legislature to confer, on a Chamber thereof or on both Chambers sitting together or any committee or officer of the Legislature, the status of a court, or

any punitive or disciplinary powers other than the power to remove or exclude persons infringing the rules or standing orders, or otherwise behaving in a disorderly manner.

(4) Provision may be made by an Act of the Provincial Legislature for the punishment, on conviction before a court, of persons who refuse to give evidence or produce documents before a committee of a Chamber when duly required by the chairman of a committee so to do:

Provided that any such Act shall have effect subject to such rules for regulating the attendance before such committees of persons who are, or have been, in the service of the Crown in India, and safeguarding confidential matter from disclosure, as may be made by the Governor exercising his individual judgment.

(5) The provisions of subsections (1) and (2) of this section shall apply in relation to persons who by virtue of this Act have the right to speak in and otherwise take part in the proceedings of a Chamber as they apply in relation to members of the Legislature.

See s. 28 and Introduction to Part II, Chapter III under PRIVILEGES OF THE INDIAN LEGISLATURE, FREEDOM OF SPEECH: PUBLICATION.

The provisions of Cl. (4) of the section are not to apply to Sind or to Orissa. See paragraph 20 of the Government of India (Constitution of Sind) Order, 1936, and paragraph 11 of the Government of India (Constitution of Orissa) Order, 1936.

For definition of *existing Indian law*, see s. 311(2).

72. Members of Provincial Legislative Assemblies and Legislative Councils shall be entitled to receive such salaries and allowances as may from time to time be determined by Act of the Provincial Legislature, and until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the commencement of this Part of this Act applicable in the case of members of the Legislative Council of the Province. *Salaries and allowances of members*

See s. 29 and notes thereunder.

Legislative Procedure

73.—(1) Subject to the special provisions of this Part of this Act with respect to financial Bills, a Bill may originate in either Chamber of the Legislature of a Province which has a Legislative Council. *Introduction of Bills, etc.*

(2) A Bill pending in the Legislature of a Province shall not lapse by reason of the prorogation of the Chamber or Chambers thereof.

(3) A Bill pending in the Legislative Council of a Province which has not been passed by the Legislative Assembly shall not lapse on a dissolution of the Assembly.

(4) A Bill which is pending in the Legislative Assembly of a Province, or which having been passed by the Legislative Assembly is pending in the Legislative Council, shall lapse on a dissolution of the Assembly.

See s. 30 and Introduction to Part II, Chapter III under RELATION OF THE TWO HOUSES OF PROVINCIAL LEGISLATURE.

Passing of Bills in Provinces having Legislative Councils

74.—(1) Subject to the provisions of this section, a Bill shall not be deemed to have been passed by the Chambers of the Legislature of a Province having a Legislative Council, unless it has been agreed to by both Chambers, either without amendments or with such amendments only as are agreed to by both Chambers.

(2) If a Bill which has been passed by the Legislative Assembly and transmitted to the Legislative Council is not, before the expiration of twelve months from its reception by the Council, presented to the Governor for his assent, the Governor may summon the Chambers to meet in a joint sitting for the purpose of deliberating and voting on the Bill:

Provided that, if it appears to the Governor that the Bill relates to finance or affects the discharge of any of his special responsibilities, he may summon the Chambers to meet in a joint sitting for the purpose aforesaid notwithstanding that the said period of twelve months has not elapsed.

The functions of the Governor under the proviso to this subsection shall be exercised by him in his discretion.

(3) If at a joint sitting of the two Chambers summoned in accordance with the provisions of this section the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Chambers present and voting, it shall be deemed for the purposes of this Act to have been passed by both Chambers:

Provided that at a joint sitting—

(a) unless the Bill has been passed by the Legislative Council with amendments and returned to the Legislative Assembly, no amendment shall be proposed to the Bill other than such amendments, if any, as are made necessary by the delay in the passage of the Bill;

(b) if the Bill has been so passed and returned by the Legislative Council, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Chambers have not agreed,

and the decision of the person presiding as to the amendments which are admissible under this subsection shall be final.

Cl. (1): See s. 30(2)—Federal Legislature.

Cl. (2) and (3): See s. 31—Federal Legislature, and notes thereunder; and Introduction to Part II, Chapter III, under DEADLOCKS. In the Federal Legislature, under s. 31(1) (c), six months at least must have elapsed between the date of reception of the Bill by the other Chamber (after being passed by one Chamber) without the Bill being presented to the Governor-General for assent. In the case of the Provincial Legislature, the interval is twelve months. The White Paper proposed a period of three months in both these cases. The Joint Committee in paragraph 150 of their Report thought the period too short in the case of the Provincial Legislature; this period would make the powers of the Legislative Council derisory and they thought the period should be at least twelve months. But in the case of the Federal Legislature, they recommended a period of six months.[1] This difference is due to the fact that in the Provinces, the Upper House has not co-equal powers with the Lower House, and the functions of the former are only those of revision and delay. But if the Bill relates to finance or to any of the Governor's special responsibilities,[2] the Governor may convene a joint sitting at once. At the joint sitting of the two Chambers, the President of the Legislative Council or in his absence such person as may be determined by rules of procedure made under s. 84 is to preside. There will be no joint sitting over the budget, as there is in the case of the Federal Legislature.[3] The Upper House in the Provinces has no right so far as the estimates are concerned. If the Provincial Assembly has refused assent to any demand or reduced the demand, the Governor, if he thinks that the refusal or reduction will affect the due discharge of any of his special responsibilities, may include in the schedule of authorized expenditure such additional amount as he thinks necessary, not exceeding in total the original demand.[4]

75. A Bill which has been passed by the Provincial Legislative Assembly or, in the case of a Province having a Legislative Council, has been passed by both Chambers of the Provincial Legislature, shall be presented to the Governor, and the Governor in his discretion shall declare either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reserves the Bill for the consideration of the Governor-General: Assent to Bills

[1] J.C.R. 216.
[2] S. 52.
[3] S. 34.
[4] S. 80.

Provided that the Governor may in his discretion return the Bill together with a message requesting that the Chamber or Chambers will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the Chamber or Chambers shall reconsider it accordingly.

See s. 32—Federal Legislature and notes thereunder and Appendix I under RESERVATION AND DISALLOWANCE.
See s. 63 for the Governor's right to send messages.

Bills reserved for consideration

76.—(1) When a Bill is reserved by a Governor for the consideration of the Governor-General, the Governor-General shall in his discretion declare, either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reserves the Bill for the signification of His Majesty's pleasure thereon :

Provided that the Governor-General may, if he in his discretion thinks fit, direct the Governor to return the Bill to the Chamber, or, as the case may be, the Chambers, of the Provincial Legislature together with such a message as is mentioned in the proviso to the last preceding section and, when a Bill is so returned, the Chamber or Chambers shall reconsider it accordingly and, if it is again passed by them with or without amendment, it shall be presented again to the Governor-General for his consideration.

(2) A Bill reserved for the signification of His Majesty's pleasure shall not become an Act of the Provincial Legislature unless and until, within twelve months from the day on which it was presented to the Governor, the Governor makes known by public notification that His Majesty has assented thereto.

See s. 32 and notes thereunder. The Governor-General, instead of assenting, refusing to assent or reserving assent, may direct the Governor to return the Bill to the Legislature with a message recommending certain amendments.

Power of Crown to disallow Acts

77. Any Act assented to by the Governor or the Governor-General may be disallowed by His Majesty within twelve months from the date of the assent, and where any Act is so disallowed the Governor shall forthwith make the disallowance known by public notification and

as from the date of the notification the Act shall become void.

See s. 32(3).

Procedure in Financial Matters

78.—(1) The Governor shall in respect of every financial year cause to be laid before the Chamber or Chambers of the Legislature a statement of the estimated receipts and expenditure of the Province for that year, in this Part of this Act referred to as the 'annual financial statement'. Annual financial statement

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(*a*) the sums required to meet expenditure described by this Act as expenditure charged upon the revenues of the Province; and

(*b*) the sums required to meet other expenditure proposed to be made from the revenues of the Province,

and shall distinguish expenditure on revenue account from other expenditure, and indicate the sums, if any, which are included solely because the Governor has directed their inclusion as being necessary for the due discharge of any of his special responsibilities.

(3) The following expenditure shall be expenditure charged on the revenues of each Province—

(*a*) the salary and allowances of the Governor and other expenditure relating to his office for which provision is required to be made by Order in Council;

(*b*) debt charges for which the Province is liable, including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;

(*c*) the salaries and allowances of ministers, and of the advocate-general;

(*d*) expenditure in respect of the salaries and allowances of judges of any High Court;

(*e*) expenditure connected with the administration of any areas which are for the time being excluded areas;

(*f*) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(*g*) any other expenditure declared by this Act or any Act of the Provincial Legislature to be so charged.

(4) Any question whether any proposed expenditure falls within a class of expenditure charged on the revenues of the Province shall be decided by the Governor in his discretion.

See Introduction to Part II, Chapter III under FINANCIAL BILLS AND DEMAND FOR GRANTS: RELATION BETWEEN THE TWO HOUSES OF PROVINCIAL LEGISLATURE, and notes to s. 33 under PROVINCE and DIFFERENCE IN PROCEDURE.

Revenues of the Province: Defined in s. 136.

Cl. (3): Expenditure charged on the revenues of the Province are non-votable—s. 79(1). For other such expenditure, see ss. 247(4) and 259(1)—salaries of certain officials; s. 268—expenses of the Provincial Public Service Commission; s. 270(2)—costs incurred by official in successfully defending himself; s. 296(3)—salaries of members of Court of Appeal in revenue matters if established; s. 167(1)—salaries of Provincial Auditor-General.

Procedure in Legislature with respect to estimates

79.—(1) So much of the estimates of expenditure as relates to expenditure charged upon the revenues of a Province shall not be submitted to the vote of the Legislative Assembly, but nothing in this subsection shall be construed as preventing the discussion in the Legislature of those estimates, other than estimates relating to expenditure referred to in paragraph (*a*) of subsection (3) of the last preceding section.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants, to the Legislative Assembly, and the Legislative Assembly shall have power to assent, or to refuse to assent, to any demand, or to assent to a demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the Governor.

See s. 34—Federal Legislature, and notes thereto. Estimates coming under s. 78(2) (*a*) (which are charged on provincial revenues) are non-votable. All other expenditure referred to in s. 78(2) (*b*) are to be submitted to the vote of the Assembly, including amounts directed to be included in the estimates by the Governor as necessary for the due discharge of any of his special responsibilities.

Cl. (3): See ss. 34(4) and 37(1), and Introduction to Part II, Chapter III under FINANCIAL BILLS AND DEMANDS FOR GRANTS.

80.—(1) The Governor shall authenticate by his signature a schedule specifying— Authentication of schedule of authorised expenditure

(*a*) the grants made by the Assembly under the last preceding section ;

(*b*) the several sums required to meet the expenditure charged on the revenues of the Province but not exceeding, in the case of any sum, the sum shown in the statement previously laid before the Chamber or Chambers :

Provided that, if the Assembly have refused to assent to any demand for a grant or have assented to such a demand subject to a reduction of the amount specified therein, the Governor may, if in his opinion the refusal or reduction would affect the due discharge of any of his special responsibilities, include in the schedule such additional amount, if any, not exceeding the amount of the rejected demand or the reduction, as the case may be, as appears to him necessary in order to enable him to discharge that responsibility.

(2) The schedule so authenticated shall be laid before the Assembly but shall not be open to discussion or vote in the Legislature.

(3) Subject to the provisions of the next succeeding section, no expenditure from the revenues of the Province shall be deemed to be duly authorised unless it is specified in the schedule so authenticated.

See s. 35 and notes thereunder. All proposals for appropriation, except those relating to expenditure charged on provincial revenues, are to be submitted to the vote of the Provincial Assembly—including those inserted at the direction of the Governor as necessary for the discharge of any of his special responsibilities. Except in the latter case (which in the event of an adverse vote, can be restored) the decision of the Assembly is final. Until the presentation of the first budget under the new Act, the Governor may, in his discretion, authorize expenditure from the provincial revenues to carry on the business of the Government. See paragraph 5 of the Government of India (Commencement and Transitory Provisions) Order, 1936.

81. If in respect of any financial year further expenditure from the revenues of the Province becomes necessary over and above the expenditure theretofore authorised for that year, the Governor shall cause to be laid before the Chamber or Chambers a supplementary statement showing the estimated amount of that expenditure, and the provisions of the preceding sections shall have effect in relation to that statement and that expenditure as they Supplementary statements of expenditure

have effect in relation to the annual financial statement and the expenditure mentioned therein.

It is doubtful whether, after an adverse vote in the Council in respect of a demand, which is final,[1] the same or similar demand can be brought forward again on a supplementary estimate under this section.[2] It is only when the amount passed in the budget is found insufficient for the purpose in the course of the year and further expenditure *becomes* necessary over and above the expenditure sanctioned for the year, that a supplementary demand can be made. But when the demand under any particular head is totally refused, it is submitted that a supplementary demand for any sum under this head cannot be made. It is to be noted that the old Act did not deal with the question of budget and that this matter was regulated by rules and standing orders made under the Act. In this Act however, matters regarding the budget are provided for in the Act itself and cannot be amended under the powers reserved to His Majesty under s. 308(4).

Special provisions as to financial Bills

82.—(1) A Bill or amendment making provision—

(*a*) for imposing or increasing any tax ; or

(*b*) for regulating the borrowing of money or the giving of any guarantee by the Province, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Province ; or

(*c*) for declaring any expenditure [redacted] charged on the revenues of the Province, or for increasing the amount of any such expenditure,

shall not be introduced or moved except on the recommendation of the Governor, and a Bill making such provision shall not be introduced in a Legislative Council.

(2) A Bill or amendment shall not be deemed to make provision for any of the purposes aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand and payment of fees for licences or fees for services rendered.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the revenues of a Province shall not be passed by a Chamber of the Legislature unless the Governor has recommended to that Chamber the consideration of the Bill.

[1] See notes to s. 80 above.

[2] See notes under s. 36 and *K. S. Roy* v. *H. E. A. Cotton & ors.* (1924), 40 C.L.J. 515.

See s. 37 and notes thereunder and Introduction to Part II, Chapter III under FINANCIAL BILLS.

Cl. (3): See s. 79(3).

Provisions with respect to certain educational grants

83.—(1) If in the last complete financial year before the commencement of this Part of this Act a grant for the benefit of the Anglo-Indian and European communities or either of them was included in the grants made in any Province for education, then in each subsequent financial year, not being a year in which the Provincial Legislative Assembly otherwise resolve by a majority which include at least three-fourths of the members of the Assembly, a grant shall be made for the benefit of the said community or communities not less in amount than the average of the grants made for its or their benefit in the ten financial years ending on the thirty-first day of March, nineteen hundred and thirty-three:

Provided that, if in any financial year the total grant for education in the Province is less than the average of the total grants for eduation in the Province in the said ten financial years, then, whatever fraction the former may be of the latter, any grant made under this subsection in that financial year for the benefit of the said community or communities need not exceed that fraction of the average of the grants made for its or their benefit in the said ten financial years.

In computing for the purposes of this subsection the amount of any grants, grants for capital purposes shall be included.

(2) The provisions of this section shall cease to have effect in a Province if at any time the Provincial Legislative Assembly resolve by a majority which includes at least three-fourths of the members of the Assembly that those provisions shall cease to have effect.

(3) Nothing in this section affects the special responsibility of the Governor of a Province for the safeguarding of the legitimate interests of minorities.

This section safeguards the education grant for the Anglo-Indian and European communities in the Province. If during 1936-37—the last complete financial year before Part III of this Act comes into force—any grant was made for them then such grant in the following years, must not be less than the average of such grants for 10 years ending 31 March 1933 unless the total education grant has been cut down. In that case the grant for these communities may be cut down *pro rata*. But in any particular year, their average grant may be reduced if a majority of three-fourths of the members of the Assembly so resolve.

This section may cease to have effect at all if so resolved by a like majority.

Cl. (3) : Under s. 52(1) (*b*), the Governor has a special responsibility to safeguard the legitimate interests of minorities. Minorities will include the Anglo-Indian and the European communities. S. 242(2) and (3) provide safeguards for recruitment from the Anglo-Indian community to the railway, customs, postal and telegraph services.

Procedure Generally

Rules of procedure

84.—(1) A Chamber of a Provincial Legislature may make rules for regulating, subject to the provisions of this Act, their procedure and the conduct of their business :

Provided that, as regards either a Legislative Assembly or a Legislative Council, the Governor shall in his discretion, after consultation with the Speaker or the President, as the case may be, make rules—

(*a*) for regulating the procedure of, and the conduct of business in, the Chamber in relation to any matter which affects the discharge of his functions in so far as he is by or under this Act required to act in his discretion or to exercise his individual judgment ;

(*b*) for securing the timely completion of financial business ;

(*c*) for prohibiting the discussion of, or the asking of questions on, any matter connected with any Indian State unless the Governor in his discretion is satisfied that the matter affects the interests of the Provincial Government or of a British subject ordinarily resident in the Province, and has given his consent to the matter being discussed, or to the question being asked ;

(*d*) for prohibiting, save with the consent of the Governor in his discretion—

(i) the discussion of or the asking of questions on any matter connected with relations between His Majesty or the Governor-General and any foreign State or Prince; or

(ii) the discussion, except in relation to estimates of expenditure, of, or the asking of questions on, any matters connected with the tribal areas or arising out of or affecting the administration of an excluded area ; or

(iii) the discussion of, or the asking of questions on, the personal conduct of the Ruler of any Indian State or of a member of the ruling family thereof;

and, if and in so far as any rule so made by the Governor is inconsistent with any rule made by a Chamber, the rule made by the Governor shall prevail.

(2) In a Province having a Legislative Council the Governor, after consultation with the Speaker and the President, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Chambers.

The said rules shall make such provision for the purposes specified in the proviso to the preceding subsection as the Governor in his discretion may think fit.

(3) Until rules are made under this section the rules of procedure and standing orders in force immediately before the commencement of this Part of this Act with respect to the Legislative Council of the Province shall have effect in relation to the Legislature of the Province, subject to such modifications and adaptations as may be made therein by the Governor acting in his discretion.

(4) At a joint sitting of two Chambers the President of the Legislative Council, or in his absence such person as may be determined by rules of procedure made under this section, shall preside.

See s. 38 and notes thereunder and Introduction.

Cl. (1), Prov. (c) and (d): Rules 7–9, 22 and 23 of the old Governor's Legislative Council Rules regulated the asking of questions and discussions or resolutions. See Introduction to Part II, Chapter III, under FREEDOM OF DISCUSSION.

Joint Sittings: see s. 74.

85. All proceedings in the Legislature of a Province shall be conducted in the English language: English to be used in Provincial Legislatures

Provided that the rules of procedure of the Chamber or Chambers, and the rules, if any, with respect to joint sittings, shall provide for enabling persons unacquainted, or not sufficiently acquainted, with the English language to use another language.

See notes to s. 227.

Restrictions on discussion in the Legislature

86.—(1) No discussion shall take place in a Provincial Legislature with respect to the conduct of any judge of the Federal Court or of a High Court in the discharge of his duties.

In this subsection the reference to a High Court shall be construed as including a reference to a court in a Federated State which is a High Court for any of the purposes of Part IX of this Act.

(2) If the Governor in his discretion certifies that the discussion of a Bill introduced or proposed to be introduced in the Provincial Legislature, or of any specified clause of a Bill, or of any amendment moved or proposed to be moved to a Bill, would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquillity of the Province or any part thereof, he may in his discretion direct that no proceedings, or no further proceedings, shall be taken in relation to the Bill, clause or amendment, and effect shall be given to the direction.

See s. 40 and notes thereunder, and Introduction to Part II, Chapter III, under FREEDOM OF DISCUSSION.

Courts not to inquire into proceedings of the Legislature

87.—(1) The validity of any proceedings in a Provincial Legislature shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or other member of a Provincial Legislature in whom powers are vested by or under this Act for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

See s. 41 and notes thereunder. S. 71(3) limits the power of the Legislature to authorize its officers to take steps to preserve order.

CHAPTER IV

LEGISLATIVE POWERS OF GOVERNOR

INTRODUCTION

Under the old Act, the Governor had no power to issue any ordinance. But now in an autonomous Province, such a power should be vested in the Governor. S. 42 deals with the issue of an ordinance when the Legislature is in session and s. 43 deals with such issue at any time. In the former case, the Legislature can control the action of the Governor and by the passing of a resolution agreed to by both Chambers, disapproving the ordinance, it shall cease to operate. The matter must be laid before the Legislature when it meets; the ordinance will have no effect six weeks after the re-assembly. An ordinance under s. 89 is subject to the approval of the Governor-General, just like a Governor's Act under s. 90. Both are to be regarded as if they were provincial Acts passed with the Governor's consent, which require the assent of the Governor-General.[1]

Power of Governor to promulgate ordinances during recess of Legislature

88.—(1) If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require:

Provided that the Governor—

(*a*) shall exercise his individual judgment as respects the promulgation of any ordinance under this section, if a Bill containing the same provisions would under this Act have required his or the Governor-General's previous sanction to the introduction thereof into the Legislature; and

(*b*) shall not without instructions from the Governor-General, acting in his discretion, promulgate any such ordinance, if a Bill containing the same provisions would under this Act have required the Governor-General's previous sanction for the introduction thereof into the Legislature, or if he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the Governor-General.

(2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial

[1] See Introduction to Part II, Chapter IV, and J.C.R. 104–06.

Legislature assented to by the Governor, but every such ordinance—

(*a*) shall be laid before the Provincial Legislature and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or, if a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council ;

(*b*) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Provincial Legislature assented to by the Governor ; and

(*c*) may be withdrawn at any time by the Governor.

(3) If and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature assented to by the Governor, it shall be void.

See Introduction to Part II, Chapter IV, J.C.R. 104–106 and notes to s. 42.

Power of Governor to promulgate ordinances at any time with respect to certain subjects

89.—(1) If at any time the Governor of a Province is satisfied that circumstances exist which render it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion, or to exercise his individual judgment, he may promulgate such ordinances as in his opinion the circumstances of the case require.

(2) An ordinance promulgated under this section shall continue in operation for such period not exceeding six months as may be specified therein, but may by a subsequent ordinance be extended for a further period not exceeding six months.

(3) An ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor, but every such ordinance—

(*a*) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Provincial Legislature ;

(b) may be withdrawn at any time by the Governor; and

(c) if it is an ordinance extending a previous ordinance for a further period, shall be communicated forthwith through the Governor-General to the Secretary of State and shall be laid by him before each House of Parliament.

(4) If and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature, it shall be void:

Provided that for the purposes of the provisions of this Act relating to the effect of an Act of a Provincial Legislature which is repugnant to an Act of the Federal Legislature, an ordinance promulgated under this section shall be deemed to be an Act of the Provincial Legislature which has been reserved for the consideration of the Governor-General and assented to by him.

(5) The functions of the Governor under this section shall be exercised by him in his discretion but he shall not exercise any of his powers hereunder except with the concurrence of the Governor-General in his discretion:

Provided that, if it appears to the Governor that it is impracticable to obtain in time the concurrence of the Governor-General, he may promulgate an ordinance without the concurrence of the Governor-General, but in that case the Governor-General in his discretion may direct the Governor to withdraw the ordinance and the ordinance shall be withdrawn accordingly.

See Introduction to Part II, Chapter IV, J.C.R. 108 and notes to s. 43.

Power of Governor in certain circumstances to enact Acts

90.—(1) If at any time it appears to the Governor that, for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment, it is essential that provision should be made by legislation, he may by message to the Chamber or Chambers of the Legislature explain the circumstances which in his opinion render legislation essential, and either—

(a) enact forthwith as a Governor's Act a Bill containing such provisions as he considers necessary: or

(*b*) attach to his message a draft of the Bill which he considers necessary.

(2) Where the Governor takes such action as is mentioned in paragraph (*b*) of the preceding subsection, he may, at any time after the expiration of one month, enact, as a Governor's Act, the Bill proposed by him to the Chamber or Chambers either in the form of the draft communicated to them, or with such amendments as he deems necessary, but before so doing he shall consider any address which may have been presented to him within the said period by the Chamber or either of the Chambers with reference to the Bill or to amendments suggested to be made therein.

(3) A Governor's Act shall have the same force and effect, and shall be subject to disallowance in the same manner, as an Act of the Provincial Legislature assented to by the Governor and, if and so far as it makes any provision which would not be valid if enacted in an Act of that Legislature, shall be void:

Provided that, for the purposes of the provisions of this Act relating to the effect of an Act of a Provincial Legislature which is repugnant to an Act of the Federal Legislature, a Governor's Act shall be deemed to be an Act reserved for the consideration of the Governor-General and assented to by him.

(4) Every Governor's Act shall be communicated forthwith through the Governor-General to the Secretary of State and shall be laid by him before each House of Parliament.

(5) The functions of the Governor under this section shall be exercised by him in his discretion, but he shall not exercise any of his powers thereunder except with the concurrence of the Governor-General in his discretion.

See Introduction to Part II, Chapter IV and s. 44 and notes thereto. The Governor's ordinance is to be regarded as an Act of the Provincial Legislature, and so, if repugnant to a Federal Act, shall be void to the extent of the repugnancy.

For the Governor's right to send messages, see s. 63.

CHAPTER V

EXCLUDED AREAS AND PARTIALLY EXCLUDED AREAS

INTRODUCTION

His Majesty may by Order in Council declare what areas are to be excluded or partially excluded areas. Such Order in Council is to be laid in draft before Parliament for approval. An Order in Council under s. 91 has already been made.

As recommended by the Statutory Commission, the Governor is not to be guided by the advice of his ministers in the administration of the excluded or partially excluded areas. The power of the Federal or Provincial Legislature shall not apply to such areas unless the Governor so directs, and it is open to him in giving such a direction to modify the Act as he thinks proper, in its application to such areas. He is authorized to make regulations for the peace and good government of an excluded or partially excluded area, and may thereby repeal or amend any Federal or Provincial Act, subject to assent or disallowance as in case of Provincial Acts assented to by him. In an excluded area the Governor will himself in his discretion direct and control the administration. In case of a partially excluded area, the Governor under s. 52(1) of the Act is to have special responsibility.

By Order in Council His Majesty may at any time alter the limits of excluded or partially excluded area or declare that the part of a partially excluded area shall cease to be so, and, on alteration of boundaries of a Province, declare a new territory to be an excluded or partially excluded area.

Excluded areas and partially excluded areas

91.—(1) In this Act the expressions 'excluded area' and 'partially excluded area' mean respectively such areas as His Majesty may by Order in Council declare to be excluded areas or partially excluded areas.

The Secretary of State shall lay the draft of the Order which it is proposed to recommend His Majesty to make under this subsection before Parliament within six months from the passing of this Act.

(2) His Majesty may at any time by Order in Council—

(*a*) direct that the whole or any specified part of an excluded area shall become, or become part of, a partially excluded area;

(*b*) direct that the whole or any specified part of a partially excluded area shall cease to be a partially excluded area or a part of such an area;

(*c*) alter, but only by way of rectification of boundaries, any excluded or partially excluded area;

(*d*) on any alteration of the boundaries of a Province, or the creation of a new Province, declare any territory not previously included in any Province to be, or to form part of, an excluded area or a partially excluded area,

and any such Order may contain such incidental and consequential provisions as appear to His Majesty to be necessary and proper, but save as aforesaid the Order in Council made under subsection (1) of this section shall not be varied by any subsequent Order.

See J.C.R. 144 and Introduction to this Chapter.

The Government of India (Excluded and Partially Excluded Areas) Order, 1936, has prescribed what areas are to be excluded areas, and what are to be partially excluded areas. The recommendations of the Provincial Governments and of the Government of India on this matter have been printed as a Command Paper which was presented to Parliament by the Secretary of State in January 1936.

Administration of excluded areas and partially excluded areas

92.—(1) The executive authority of a Province extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area, unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(2) The Governor may make Regulations for the peace and good government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any Regulations so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature, or any existing Indian law, which is for the time being applicable to the area in question.

Regulations made under this subsection shall be submitted forthwith to the Governor-General and until assented to by him in his discretion shall have no effect, and the provisions of this Part of this Act with respect to the power of His Majesty to disallow Acts shall apply in relation to any such Regulations assented to by the Governor-General as they apply in relation to Acts of a Provincial Legislature assented to by him.

(3) The Governor shall, as respects any area in a Province which is for the time being an excluded area exercise his functions in his discretion.

See J.C.R. 144, s. 52(1) (e) of this Act, and Introduction to this Chapter.

CHAPTER VI

PROVISIONS IN CASE OF FAILURE OF CONSTITUTIONAL MACHINERY

Power of Governor to issue Proclamations

93.—(1) If at any time the Governor of a Province is satisfied that a situation has arisen in which the government of the Province cannot be carried on in accordance with the provisions of this Act, he may by Proclamation—

(*a*) declare that his functions shall, to such extent as may be specified in the Proclamation, be exercised by him in his discretion ;

(*b*) assume to himself all or any of the powers vested in or exercisable by any Provincial body or authority ;

and any such Proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any Provincial body or authority :

Provided that nothing in this subsection shall authorise the Governor to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend, either in whole or in part, the operation of any provision of this Act relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) A Proclamation under this section—

(*a*) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament ;

(*b*) unless it is a Proclamation revoking a previous Proclamation, shall cease to operate at the expiration of six months :

Provided that, if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of twelve months from the date on which under this subsection it would otherwise have ceased to operate, but no

such Proclamation shall in any case remain in force for more than three years.

(4) If the Governor, by a Proclamation under this section, assumes to himself any power of the Provincial Legislature to make laws, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect, unless sooner repealed or re-enacted by Act of the appropriate Legislature, and any reference in this Act to Provincial Acts, Provincial laws, or Acts or laws of a Provincial Legislature shall be construed as including a reference to such a law.

(5) The functions of the Governor under this section shall be exercised by him in his discretion and no Proclamation shall be made by a Governor under this section without the concurrence of the Governor-General in his discretion.

See J.C.R. 109, Introduction to Part II, Chapter V and notes to s. 45.

In his discretion: See s. 9 and notes thereto.

PART IV

THE CHIEF COMMISSIONERS' PROVINCES

PART IV

THE CHIEF COMMISSIONERS' PROVINCES

INTRODUCTION

In theory all the parts of British India which were not included in a governorship or lieutenant-governorship, were under the immediate authority and management of the Governor-General in Council who could give all necessary orders and directions for their administration. A Chief Commissioner was regarded as administering his Province as delegate of the Governor-General who could resume or modify such powers as he had himself conferred. Chief Commissionerships were generally referred to as local administrations rather than as local governments. By s. 58 of the old Act as amended in 1919, it was provided, that the Provinces known as the N.-W. Frontier Province, British Baluchistan, Delhi, Ajmer-Merwara, Coorg and the Andaman and Nicobar Islands were to be administered by Chief Commissioners. Old s. 59 provided that the Governor-General in Council with the approval of the Secretary of State could take any part of British India under his immediate authority and management by placing it under a Chief Commissioner. Assam and the Central Provinces ceased to be Chief Commissionerships. By the amendments in 1919 to the old Act, the position of the Chief Commissioner was greatly improved. He was included within the definition of local government and his legislative council included elected members. His position was practically that of the Governor or the Lieutenant-Governor. He was exempt from the original jurisdiction of the High Courts. He could assent to, or withhold his assent from, Bills or return Bills or reserve them for the consideration of the Governor-General.[1]

British Baluchistan

The mountainous country of Baluchistan is considerably larger than the British Isles. The occupation of the country was forced upon the Government of India, and is maintained for purely strategic purposes. Two-thirds of Baluchistan is not under British administration; of the remaining third, only 9,000 square miles form really British territory, the rest consisting of 'Agency areas', which are administered by the Chief Commissioner as Agent to the Governor-General under the authority of the Indian (Foreign Jurisdiction) Order in Council, 1902. British Baluchistan was formed into a Chief Commissionership in 1887. It was, like the other frontier province—the N.-W. Frontier Province—more directly than any of the other Chief Commissionerships, under the control of the Government of India, acting through its foreign and political department both because political questions are of preponderant importance and because it lacked the financial resources and powers which more settled provinces enjoyed. Under the new Act, the peculiar position of British Baluchistan is preserved. In the administration of this Province, the Governor-General is not to be guided by ministerial advice and is to act on his sole responsibility to the Secretary of State. The Governor-General shall himself direct and control the administration of this Province; but there will not be a reserved department of British

[1] See old ss. 81 and 81A.

Baluchistan which will be in no different position from other Chief Commissioners' Provinces, except that ministers will not advise the Governor-General in regard to its administration. The powers of the Federal Legislature will not extend to the Province of British Baluchistan, and the Governor-General in his discretion may make regulations which will repeal or amend a Federal Act or existing law applicable to the Province. The Governor-General may by notification direct that a Federal Act may, with such modifications or exceptions as he thinks fit, apply to that Province. The regulations made by him are to be regarded as Federal Acts assented to by him and are subject to similar disallowance by His Majesty.

Delhi, Ajmer-Merwara, Coorg, and the Andaman and Nicobar Islands

Delhi comprises a small area enclosing the new capital city, which was created as a separate Province under a Chief Commissioner on the occasion of the King-Emperor's Durbar in 1912. The sole object of creating the Province was to provide the Government of India with a seat free from the dominant influence of any Provincial Government. Its budget is a part of the central budget and it was subject to the jurisdiction of the central Legislature ; under the Delhi Laws Act, XIII of 1912, the Governor-General in Council has the power of extending to it any Acts in force in any other part of British India. Delhi is represented in the central Legislative Assembly by one elected member, and its Chief Commissioner is in practice nominated a member of the Council of State. Under the new Act, Delhi is to be represented in the Federal Assembly by two elected members and in the Council of State by one. Ajmer was ceded in 1819. The Ajmer-Merwara Province is separately administered only because it is too isolated to be included in any Governor's Province. The Province had one elected seat in the central Legislative Assembly and one in the Council of State. The central Legislature could make laws for the Province, but the Governor-General in Council had the power of legislating for it by regulations under s. 71 of the old Act. Coorg was annexed in 1834. The British Resident of Mysore is the Chief Commissioner of Coorg. It has a Legislative Council of 20 members, of whom 15 are elected. The Council has legislative, deliberative and interrogatory powers but its resolutions on the budget are merely recommendatory. Its Bills are subject both to the previous sanction and also the subsequent assent of the Governor-General. Coorg under the new Act has been given one elected seat in the Federal Assembly and one in the Council of State.

Administration

The administration of these Provinces is in the hands of the Governor-General, acting to such extent as he thinks fit, through a Chief Commissioner appointed by him in his discretion. Except as regards British Baluchistan and the Andaman and Nicobar Islands, he is to be guided by ministerial advice. As in the case of British Baluchistan, the Andaman and Nicobar Islands are to be governed by regulations made by the Governor-General in his discretion, such regulations repealing or amending any Federal law or existing law applicable thereto. The existing arrangements in force about Coorg are to prevail.

Chief Commissioners' Provinces

94.—(1) The following shall be the Chief Commissioners' Provinces, that is to say, the heretofore existing Chief Commissioners' Provinces of British Baluchistan,

Delhi, Ajmer-Merwara, Coorg and the Andaman and Nicobar Islands, the area known as Panth Piploda, and such other Chief Commissioners' Provinces as may be created under this Act.

(2) Aden shall cease to be part of India.

(3) A Chief Commissioner's Province shall be administered by the Governor-General acting, to such extent as he thinks fit, through a Chief Commissioner to be appointed by him in his discretion.

See Introduction to this Chapter. For Aden, see s. 288 and notes thereunder.

95.—(1) In directing and controlling through the Chief Commissioner the administration of British Baluchistan, the Governor-General shall act in his discretion. British Baluchistan

(2) The executive authority of the Federation extends to British Baluchistan as it extends to other Chief Commissioners' Provinces, but, notwithstanding anything in this Act, no Act of the Federal Legislature shall apply to British Baluchistan unless the Governor-General in his discretion by public notification so directs and the Governor-General in giving such a direction with respect to any Act may direct that the Act shall in its application to the Province, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(3) The Governor-General may in his discretion make Regulations for the peace and good government of British Baluchistan, and any Regulations so made may repeal or amend any Act of the Federal Legislature or any existing Indian law which is for the time being applicable to the Province and, when promulgated by the Governor-General, shall have the same force and effect as an Act of the Federal Legislature which applies to the Province.

The provisions of Part II of this Act relating to the power of His Majesty to disallow Acts shall apply in relation to any such Regulations as they apply in relation to Acts of the Federal Legislature assented to by the Governor-General.

96. The provisions of subsection (3) of the last preceding section shall apply in relation to the Andaman and Nicobar Islands as they apply in relation to British Baluchistan. The Andaman and Nicobar Islands

Coorg

97. Until other provision is made by His Majesty in Council, the constitution, powers and functions of the Coorg Legislative Council, and the arrangements with respect to revenues collected in Coorg and expenses in respect of Coorg, shall continue unchanged.

Provisions as to police rules, etc. and as to crimes of violence intended to overthrow the Government

98. The provisions of Part III of this Act with respect to police rules and with respect to crimes of violence intended to overthrow the government, including the provisions thereof relating to the non-disclosure of certain records and information, shall apply in relation to Chief Commissioners' Provinces as they apply in relation to Governors' Provinces, with the substitution for references to the Governor and the Chamber or Chambers of the Provincial Legislature of references to the Governor-General and the Chambers of the Federal Legislature.

See ss. 56–58 and Introduction to Part III, Chapter II under POLICE: SPECIAL POWERS TO COMBAT TERRORISM: and SECRET INTELLIGENCE REPORTS.

PART V

LEGISLATIVE POWERS

CHAPTER I

DISTRIBUTION OF POWERS

99.—(1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof. Extent of Federal and Provincial laws

(2) Without prejudice to the generality of the powers conferred by the preceding subsection, no Federal law shall, on the ground that it would have extra territorial operation, be deemed to be invalid in so far as it applies—

(*a*) to British subjects and servants of the Crown in any part of India ; or

(*b*) to British subjects who are domiciled in any part of India wherever they may be ; or

(*c*) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be ; or

(*d*) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be ; or

(*e*) in the case of a law for the regulation or discipline of any naval, military, or air force raised in British India, to members of, and persons attached to, employed with or following, that force, wherever they may be.[1]

Cl. (1) The words 'may make laws for the whole or any part of British India' follow the words of earlier statutes relating to India, such as the India Council Act, 1861[2] and the Government of India (Consolidation) Act of 1919, s. 65. The words 'peace, order and good government', though common form in every grant of constitution by the Imperial Parliament to the Dominions, have not been used in this Act. In old s. 80A, the words used were 'peace and good government'; these words were also used in W.P. Prop. 111, but find no place in the Act. In *Reg* v. *Burah*,[3] the Privy Council described the powers of the Indian Legislature when acting within limits circumscribed by Parliament as being 'plenary powers of

1 See W.P. Intr. 52–54 ; W.P. Prop. 111–19 ; J.C.R., 211–13.

2 24 & 25 Vict., c. 67, s. 22.

3 (1878) 3 A.C. 889.

legislation as large and of the same nature as those of Parliament itself'. But the observation as to 'plenary powers' of the Indian Legislature cannot be construed as carrying with it the construction put by the Privy Council on the words 'peace, order and good government', words which their lordships have declared to amount to full 'internal sovereignty'. For the meaning of these words, see *Riel* v. *The Queen* [1]; *Hodge* v. *The Queen* [2]; *A.G. for Canada* v. *Cain* [3]; per Viscount Sankey L.C. in *British Coal Corporation* v. *The King*.[4]

The Act leaves it entirely in the hands of the Rulers of States to decide the extent of the legislative power exercisable by the Federal Legislature in and over their States by the Federation. Under s. 6(2) of the Act, each Ruler is to specify in his Instrument of Accession the matters which he accepts as matters with respect to which the Federal Legislature may make laws for his State and the limitations to which the powers of the Federal Legislature to make such laws are to be subject; and by s. 101 the Federal Legislature is precluded from making laws for a Federated State otherwise than in accordance with the Instrument of Accession of the State and any limitations contained therein.

S. 294 of the new Act imposes a check on the power of the Federal Legislature to make laws for a Federated State. It is provided that the legislative power of the Federal Legislature shall not extend to any area in a Federated State which His Majesty when accepting the Instrument of Accession may declare to be an area hitherto administered on his behalf to which he considers it expedient that s. 294 shall apply. But it is open to His Majesty to relinquish his power and jurisdiction in respect of any such area. But otherwise, if after the accession of the State, power or jurisdiction is exercisable, generally or subject to limits, by the Federal Legislature, then the power or jurisdiction exercisable on His Majesty's behalf in that State in virtue of the Foreign Jurisdiction Act or otherwise shall cease.

Any federal law violating the provision of s. 101 would be *ultra vires* and all federal laws purporting to apply to a State would be read and construed by the courts in the light of its Instrument of Accession which, it will be observed, is to be 'judicially noticed', under s. 6(9). Under s. 204, the Federal Court will have original jurisdiction to decide on the validity of such a federal law on the question being raised by the State.

The subjects of any Ruler of any State acceding to the Federation must, to the extent of such accession, owe direct obedience within the State itself to federal legislation. See s. 99(2) (*d*). The same holds good as regards the subjection of the ministers and servants of the State to federal jurisdiction in federal matters.[5] Under s. 124 of the Act, the Federal Legislature may pass an Act in respect of a matter with respect to which the Provincial Legislature has no power to make laws, confer power and impose duties upon a Province or officers or authorities thereof.

The words in sub-cls. (*b*), (*c*) and (*e*)—'*wherever they may be*'—

Cl. (2) give federal laws an extra-territorial operation outside the limits of the Federation altogether, i.e. outside the limits of the Federated States and of British India.[6]

[1] 10 App. Cas. 675 at 678.
[2] 9 App. Cas. 117 at 132.
[3] [1906] A.C. 542.
[4] [1935] A.C. 500 at 518-19.
[5] See s. 124(3).
[6] See old s. 65(1) (c).

The Governor-General in Council has in his executive capacity exercised extra-territorial jurisdiction over the subjects of all the Indian States outside the territories of India, e.g. in Asia (exclusive of India) and in Africa and elsewhere by the Indian (Foreign Jurisdiction) Order in Council, 1902, under s. 1 of 39 & 40 Vict., c. 46 made by His Majesty in Council in virtue of the powers conferred on the Crown by Parliament, i.e. by the Foreign Jurisdiction Act. This extra-territorial jurisdiction was extended to the subjects of the Rulers of Indian States in virtue of those subjects, being, when outside India, 'protected persons'.[1] On somewhat the same principle, the Foreign Jurisdiction Act has been held to extend to subjects of the Amir of Afghanistan enlisted in Indian regiments serving in China, there being in that case an 'implication of consent on the part of their Ruler, the Amir.[2] The extra-territorial jurisdiction of the Governor-General will continue to be exercised by him even after the inauguration of the Federation unless the Foreign Jurisdiction Act, and the Order in Council are modified. It has no connexion with the extra-territorial jurisdiction conferred by this subsection on the Federal Legislature itself. The Governor-General in Council has in his executive capacity on His Majesty's behalf (as Viceroy now under the new Act) extra-territorial powers far wider than those which can be exercised by the Federal Legislature.[3] The language of the Order is wide enough to include every source of extra-territorial authority. The powers delegated are both legislative and executive and are exercisable within the Indian States. Whether they are also exercisable within the territories of any State outside India is a question which depends on the arrangements in force with the Government of that State and on the extent to which the powers of the Crown exercisable in pursuance of such arrangements have been delegated to the Governor-General. The jurisdiction exercisable under those powers might be made to extend not only to British subjects and to subjects of the State within which the jurisdiction is exercised, but also to European foreigners within the territories of the States. Indeed, for international purposes, the territory of Indian States is in the same position as the territory of British India.[4]

This is the present position of the subjects of Indian States in the matter of extra-territorial jurisdiction exercised by the Governor-General in Council under Imperial Act, i.e. the Foreign Jurisdiction Act of 1890. The position of the subjects of a Federated State under the extra-territorial operation given to the laws of the Federal Legislature may be stated thus. If, for instance, a State accepted Maritime Shipping (No. 22 of the federal list in the Seventh Schedule) and a Merchant Shipping Act was passed by the Federal Legislature dealing with offences against the discipline of a ship registered in India, the commission of that offence by a subject of the State in question would make him liable to conviction even though the offence was committed outside Indian territorial waters. It will be observed that federal legislation extends equally to Indian subjects of His Majesty wherever they may be.[5]

1 The preamble of 39 & 40 Vict., c. 46, quoted in Introduction to Part II, Chapter I above under INTERNAL AND EXTERNAL SOVEREIGNTY, makes this clear.

2 See *Ibrahim* v. *Rex* [1914] A.C. 579.

3 See the Indian (Foreign Jurisdiction) Order in Council, 1902.

4 See Ilbert, *Government of India*, 2nd ed. (1915), Chapter V.

5 See sub-clause (*d*).

It is a remarkable feature of the Indian constitution that long before the Dominions got extra-territorial jurisdiction, the Indian Legislature had this jurisdiction [1] at any rate over His Majesty's Indian subjects.

Federal laws will apply to all ships or aircraft registered in British India or in any Federated State and to persons on them, wherever such ships or aircraft may be. This is a very wide extension of jurisdiction of the Federal Legislature.

Cl. (2) (c)

See s. 6(2), which provides that the Instrument of Accession shall specify the matters in which the Ruler of the State agrees to allow laws to be made by the Federal Legislature and also the limitations on the power of such legislature to make laws for the State.[2]

Cl. (2) (d)

Cl. (2) (e) See old s. 65(1) (d).

As explained in paragraphs 229 and 230 of the Report of the Joint Parliamentary Committee, the general plan adopted in the new constitution has been that of a statutory distribution of legislative powers between the centre and the provinces as an essential feature of provincial autonomy. The White Paper proposal which has been adopted is to enumerate in two lists the subjects in respect of which the Federation and the Provinces respectively will have exclusive legislative jurisdiction and to enumerate in a third list the subjects in respect of which they will have concurrent legislative jurisdiction. This arrangement is a fundamental departure from the legislative relations existing under the old constitution between the centre and the provinces. Previously, the central Legislature had the power, with the previous sanction of the Governor-General, to legislate on any subject even though it be classified as a provincial subject, and a provincial legislature with a similar sanction could in its own territory deal with any subject though it be classified as a central subject.[3] The combined effect of ss. 65 and 80A of the old Act may be broadly stated as being that there was no statutory distinction between the extent of the legislative powers of the central legislature and the legislature of a province, except that the competence of the latter did not extend beyond the provincial boundaries. Old s. 84(2) provided that 'the validity of any Act of the Indian Legislature shall not be open to question in any legal proceeding on the ground that the Act affects a provincial subject or a central subject as the case may be'. But under the new constitution, there has been a sharp division of legislative powers between the central and the provincial legislatures, and it will be for the Federal Court to determine, when the matter is brought up before it, whether or not in any enactment, the legislature has transgressed the boundaries set for it by the exclusive list, federal or provincial, as the case may be. So litigation of a kind hitherto unknown in India will be the result of the change introduced.

However, there may be difficulties created by the new separation between the federal and the provincial lists, where the Provincial Legislature dealing with a purely provincial matter in List II has incidentally to deal with a matter coming under List I. Suppose the Provincial Government in passing Municipal Act—a provincial subject, List II, item (3), has to deal with the question of license for those stocking petroleum, explosives and ammunition within municipal limits. Explosives and ammunition and petroleum are central subjects (List I, items 29,

1 See s. 1, Indian Councils Act 32 & 33 Vict., c. 98.
2 See s. 101. Cf. W.P. Prop. 117.
3 See ss. 67(2) (i) and 80A(3) (f) old Act.

30 and 32). Under the old Act, sanction under old s. 80A of the Governor-General would have permitted the Provincial Legislature to pass a comprehensive municipal Act, dealing *inter alia* with the question of storage of explosives, etc.[1] But this course is not possible now, so that the portion of municipal law dealing with the question cannot be dealt with in the Provincial Legislature but must be passed by the Federal Legislature.

The lists of subjects for which the Legislature has been authorized to enact laws are set out in the Seventh Schedule, and the various provisions of the Act describe the restrictions on legislative competence; e.g. ss. 110 and 112. The authority of the Legislature is limited by this Act. In *Reg* v. *Burah*,[2] which turned on the extent of the legislative powers granted by s. 22 of the Indian Council Act,[3] Lord Selbourne defined the powers granted in the following words: 'The Indian Legislature has powers limited by the Act of the Imperial Parliament which created it and it can, of course, do nothing beyond the limits which circumscribe its powers'.[4]

But the Privy Council, in the above case, described the powers of the Indian Legislature 'when acting within these limits' as being 'plenary powers of legislation, as large and of the same nature as of the Parliament itself'. The same doctrine was applied to the provincial legislatures of Canada in *Hope* v. *The Queen*,[5] where it was held that within the limits prescribed in s. 92 of the British North America Act, the legislature had authority as plenary and as ample as that the Imperial Parliament in the plentitude of its power possessed and could bestow. In *Powell* v. *The Apollo Candle Co.*,[6] it was laid down that the colonial Parliament was entitled to delegate to the executive the fixing and levying of duties, and in *Dovie* v. *The Temperalities Board*,[7] it was held that within their sphere of legislation, the provinces were supreme and that there was no limit to their power, save that of difficulty of enforcement.

The powers of the Indian Federal Legislature are not limited territorially, and federal laws will extend to British subjects domiciled in India wherever they may be.[8] Further, under s. 99(2) (*d*), a law passed by the Federal Legislature in respect of a matter accepted in the Instrument of Accession of a State will apply to subjects of that State wherever they may be. This extra-territorial jurisdiction of laws of the Indian Legislature has been long in existence.[9]

The power of the Federal Legislature to legislate extends to every subject contained in List I (Federal Legislative List) and List III (Concurrent Legislative List) of the Seventh Schedule; the executive authority of the Federal Government is strictly defined and extends 'to the matters with respect to which the Federal Legislature has power to make laws'.[10] Thus, the executive power of the Federation is co-extensive with its legislative power. The Act in s. 99(2) also provides for the extra-territorial operation of the federal laws. The Federal Legislature cannot make laws on subjects falling within the exclusive jurisdiction of the States or the Provincial Legislatures. There is a statutory demarcation of the

[1] See Devolution Rules, Schedule I, Part I, Central Subjects, item No. 23.
[2] (1878) 3 A.C. 889.
[3] 24 & 25 Vict., c. 67.
[4] At p. 904.
[5] (1884) 9 App. Cas. 117.
[6] (1885) 10 App. Cas. 282.
[7] (1882) 7 App. Cas. 136.
[8] See s. 99(2) (*b*) and (*c*).
[9] See s. 65(1) (c), old Act.
[10] See s. 8(1) (*a*).

legislative competence of the Federal and of the Provincial Legislature, and to each is assigned an exclusive field of competence which the other will not be permitted, save to the extent indicated in the Act, to invade. See List III in the Seventh Schedule which enumerates subjects wherein both Federal and Provincial Legislatures enjoy concurrent powers. See ss. 99–101. Any statute passed either by the Federal or the Provincial Legislature in excess of its powers will be *ultra vires* and its validity can be challenged in the courts.

Restrictions of legislative powers

Certain matters have been placed absolutely outside the competence altogether of both Federal and Provincial Legislatures, viz. legislation affecting the sovereignty or the dominion of the Crown over any part of British India, the law of British nationality, the Army Act, the Air Force Act and the Naval Discipline Acts.[1] The Legislatures are debarred from legislating in such a way as to interfere with the operation of these Acts in so far as they operate in India, while, at the same time the Act gives powers to the old Indian Legislature or the new Federal Legislature to apply the provisions of the Naval Discipline Act with or without modification to members of the Indian Naval Forces.[2] There is another specific limitation on the powers of the Legislatures which render *ultra vires* certain forms of discriminating legislation, regarding taxation on British subjects or companies, British ships and aircraft, professional and technical qualifications, medical qualifications, etc.[3] Any legislative measure, federal or provincial, which is inconsistent with the provisions of Part V, Chapter III, is void, and can be challenged as such in the courts. Neither the Federal nor the Provincial Legislature has the power of compulsorily acquiring land or commercial undertaking without paying reasonable compensations therefor.[4] Apart from a complete exclusion of jurisdiction in regard to these matters, the Act places upon the competence of the Legislatures a further limitation, whereby the Governor-General's previous sanction to the introduction of certain specified classes of measures will be required.[5] Legislative proposals affecting any reserved department, the coinage and currency of the Federation or the powers and the duties of the Reserve Bank in relation to the management of currency and exchange will require the Governor-General's previous assent.[6] The Governor-General has further been empowered in any case in which he considers that a Bill introduced or proposed for introduction or any clause thereof or any amendment to a Bill moved or proposed, would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquillity of the Federation, to direct that the Bill, clause or amendment shall not be further proceeded with.[7]

Residuary powers of legislation

As already stated, the allocation of different functions to local and to central organization is an essential feature of a federation.[8] This involves a distribution of legislative powers. The manner in which powers are

[1] See ss. 99 and 110. As regards the Army, Air Force and Naval Discipline Acts (see s. 110).

[2] See s. 105.

[3] See Part V, Chapter III.

[4] See s. 299(2).

[5] E.g. see ss. 108, 109, 141, 143 and 271.

[6] See s. 153.

[7] S. 40(2).

[8] See Part II, Chapter I, Introduction under RESIDUARY POWERS.

distributed as between the federal and the state government is indeed vital.[1] In the United States all powers, not specifically given to the central authority, remain in the component states. Similarly in Australia. But in Canada, certain subjects are allocated to the Dominion Parliament, and certain others to the provincial Parliament, and it is provided in the British North America Act that the Dominion Parliament has the right to deal with matters not coming within the list of subjects assigned by the Act to the provinces. Under the new Indian constitution, a novel solution of the problem has been adopted. As pointed out in paragraphs 56 and 57 of the Report of the Joint Parliamentary Committee, a profound cleavage of opinion existed in India with regard to the allocation of residuary legislative powers: one school of thought holding as a matter of principle that these powers should be allocated to the centre, and the other holding that they should be allocated to the provinces. By s. 104, it has been provided that the Governor-General, acting in his discretion, is empowered to allocate to the Federal, or the Provincial Legislature as he may think fit, the right to legislate on any matter not covered by the enumeration in the lists in the Seventh Schedule.

As regards the legislative relation between the Federation and the Federated States, the Joint Parliamentary Committee in paragraph 236 of their Report say that while every Federal Act on a subject, accepted as federal by any State, will apply in that State (its Ruler being under the obligation to secure that due effect is given in the State to the provisions of such law), yet this jurisdiction of the Federal Legislature in the Federated States is not exclusive; for it will be competent for these States to exercise their existing powers of legislation in relation to such subject. But in case of conflict between a Federal law and a State law on a subject accepted by the State as federal, the former will prevail.[2]

Subject matter of Federal and Provincial laws

100.—(1) Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the 'Federal Legislative List').

(2) Notwithstanding anything in the next succeeding subsection, the Federal Legislature, and, subject to the preceding subsection, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List').

(3) Subject to the two preceding subsections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List').

[1] See Marriott, op. cit., Vol. II, pp. 410 *et seq.*

[2] See s. 107(3).

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.[1]

This section provides for a statutory distribution of legislative powers between the Federal and the Provincial Legislatures, and enumerates in two lists (see List I and List II of the Seventh Schedule) the subjects in relation to which the Federation and the Provinces respectively will have an exclusive legislative jurisdiction ; and in a third list[2] enumerates the subjects in relation to which the Federal and each Provincial Legislature will possess concurrent legislative powers—the powers of a Provincial Legislature in relation to the subjects in the list extending, of course, only to the territory of the Province. The subject matters mentioned in the Concurrent List (List III) fall within the legislative authority both of the Federation and of the Provinces. But under the present Act, an enactment regulating a matter included in the exclusively Provincial List will be valid only if it is passed by a Provincial Legislature, and an enactment regulating a matter included in the exclusively Federal List will be valid only if it is passed by the Federal Legislature, and, to the extent to which either Legislature invades the province of the other, its enactment will be *ultra vires* and void. It is for the Federal Court to determine whether or not in a given enactment the Legislature has transgressed the boundaries set for it by the exclusive list, Federal or Provincial, as the case may be. Disputes as to the validity of legislative jurisdictions except in the Concurrent List, will in the last resort rest with the Federal Court. In mitigation of the uncertainty arising from the inevitable risks of overlapping between entries in the three lists given in the Seventh Schedule, the section provides that the jurisdiction of the Federal Legislature shall, notwithstanding anything in Lists II and III, extend to the matters enumerated in List I, and that the jurisdiction of the Federal Legislature under List III, shall, notwithstanding anything in List II, extend to matters enumerated in List III. The effect of this is that in case of conflict between entries in List I and entries in List II, the former shall prevail and in case of conflict between entries in List III and entries in List II, the former will prevail, so far as the Federal Legislature is concerned.[3]

As the Joint Parliamentary Committee point out, the changes made from the old law will open the door to litigation of a kind which has hitherto been almost unknown in India. But the Joint Parliamentary Committee observe in paragraph 230 of their Report, that though the system existing under the old law had immense practical advantages, it would not have been possible to continue it, in a Federation based on the conception of autonomous Provinces.

This section and the Seventh Schedule allocate by enumeration almost completely the functions of legislation, including taxation, to the Federal and the Provincial Legislature. In other constitutions the method adopted has usually been to specify exhaustively the subjects allocated to one Legislature and to assign to the other the whole of the unspecified residue.[4]

[1] See W.P. Intr. 52-53 ; W.P. Prop. 110 ; J.C.R. 50, 229-34.

[2] See List III of the Seventh Schedule.

[3] J.C.R. 232.

[4] See Part II, Chapter I, Introduction under RESIDUARY POWERS

The subjects in List III are essentially provincial in character[1] and they bear a closer affinity to those included in the Provincial Legislative List than to the exclusively Federal List. The intention of providing for this concurrent field is to secure, in respect of the subjects entered in the List III, referred to in subsection (2), the greatest measure of uniformity which may be found practicable but at the same time to enable Provincial Legislatures to make laws to meet local conditions. But in the sphere of the concurrent field, the Act does not limit the powers of the Federal Legislature. The Act does not prescribe the relations between the Federal and the Provincial Legislatures in the concurrent sphere by means of rigid legal sanctions and prohibitions, and the practical relationships which are to develop between them in this limited field are left to work themselves out by constitutional usages and the influence of public opinion. But it is essential to satisfactory relations between the Federation and the Provinces, that the Federal Government before initiating legislation in this field should ascertain provincial opinion by calling into conference with themselves representatives of the Governments concerned. Although no statutory limitation has been imposed upon the exercise by the Federation of its legislative powers, the Governor-General has been given guidance in his Instrument of Instructions[2] as to the manner in which he is to exercise the discretion vested in him in relation to matters arising in the concurrent field. He, acting in his discretion, is made the arbiter between the conflicting claims of the centre and the Provinces. This, as the Joint Select Committee remarks,[3] in effect preserves, in the limited sphere of the concurrent field, the legislative relation between centre and Provinces under the old Act; and they think it would be a mistake to attempt to limit the powers of the central Legislature in this field by any statutory definition of the purposes for which, or the conditions subject to which, they are to be used.

Cl. (4)

The Federation has unfettered power of legislation as regards matters in the Provincial List for any territory not included in the Governor's Provinces and may legislate, under its extra-territorial power, on provincial matters.

101. Nothing in this Act shall be construed as empowering the Federal Legislature to make laws for a Federated State otherwise than in accordance with the Instrument of Accession of that State and any limitations contained therein.[4] Extent of power to legislate for States

Under s. 6(2), the Instrument of Accession is to specify the matters in respect of which the Federal Legislature may make laws for the State and the limitations to the powers of the Legislature to make such laws. The Indian States acceding to the Federation will become subject not only to the provisions of this Act, but to all federal legislation on subjects conceded to the Federation by the Instrument of Accession. The enactment of the Federal Legislature, acting within its legal scope, will have full force and effect throughout British India, but the Acts relating to federal subjects will only apply to the territory of the state-members of the

[1] See J.C.R. 233. [2] Par. XII. [3] Report 233.
[4] See W.P. Prop. 117, J.C.R. 219, and notes to s. 99(2) (c) above.

Federation if their Rulers have transferred the control of those subjects to the Federal Legislature. While the legislative relations between the Federation and the Provinces are determined by the distribution of the powers, both possessing a concurrent jurisdiction in certain matters not exclusively assigned to either, the relations between the Federation and the Indian States are different. Every Act of the Federal Legislature regulating any subject which has been accepted by a State as a federal subject will apply *proprio vigore* in that State as they will apply in a Province, a duty identical with that imposed upon Provincial Governments being imposed upon the Ruler to secure that due effect is given in his territories to its provisions. Yet the jurisdiction of the Federal Legislature in the States will not be exclusive. It will be competent for the States to exercise their existing powers of legislation even in relation to a federal subject, with the proviso that, in case of conflict between a state law and a federal law on a subject accepted by the state as federal, the latter will prevail.[1]

The provisions of this section excludes the jurisdiction of the Federal Legislature from the States in subjects which have not been accepted by their Rulers as federal. The effect is that all the residuary powers of legislation, i.e. all the powers not enumerated in the Instrument of Accession as given to the Federal Legislature will belong to the States. The position of a State which accedes to the Federation by an Instrument will closely correspond, in the matter of distribution of legislative powers and the judicial interpretation of that distribution, to that of the states in the federal constitution of the Australian Commonwealth and the United States of America ; where powers not expressly given up to the centre belong to the component states. See Part II, Chapter I, Introduction under head RESIDUARY POWERS. The Privy Council in determining the extent of the federal power over the six constituent states of Australia laid down the principle that in all cases of legislation by the federal legislature affecting the constituent states, 'the burden rests on those who affirm that the capacity to pass those Acts was put within the powers of the (federal) legislature to show that this was'—per Lord Haldane in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1914) A.C. 237 at page 252. So, in the case of the Indian States, the burden will rest on anyone, whether a private litigant or the Advocate-General, who claims that any particular statute of the Federal Legislature applies to the State. If he cannot establish this, the federal law will be *ultra vires.* On the other hand, when it can be shown that, as the result of the Federal List of subjects, coupled with the terms of Instrument of Accession, the Federal Legislature has acted within its powers, the legislation will be binding on the State, and any State law in conflict with it will be to the extent of such conflict void.[2]

Any pre-existing State laws on the federal subjects will not become void in virtue of the entry of a State into the Federation. The powers assigned to the Federal Legislature are nowhere expressed to be 'exclusive', so far as the States are concerned. The constituent States may therefore legislate concurrently even in respect to the matters enumerated as federal, subject to the proviso that the Federal Act will prevail in virtue of the provisions of s. 107(3).

1 See s. 107(3).

2 See s. 107(3).

102.—(1) Notwithstanding anything in the preceding sections of this chapter, the Federal Legislature shall, if the Governor-General has in his discretion declared by Proclamation (in this Act referred to as a 'Proclamation of Emergency') that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List: Power of Federal Legislature to legislate if an emergency is proclaimed

Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency.

(2) Nothing in this section shall restrict the power of a Provincial Legislature to make any law which under this Act it has power to make, but if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature has under this section power to make, the Federal law, whether passed before or after the Provincial law, shall prevail, and the Provincial law shall to the extent of the repugnancy, but so long only as the Federal law continues to have effect, be void.

(3) A Proclamation of Emergency—

(*a*) may be revoked by a subsequent Proclamation;

(*b*) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament; and

(*c*) shall cease to operate at the expiration of six months, unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.

(4) A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.[1]

Where an emergency has been declared by the Governor-General, the Federal Legislature may make on any subject laws which will override any laws, federal or provincial, which conflict with them, the Governor-

[1] See ss. 45 and 93.

General's personal legislative power being co-extensive in this respect with the powers of the Federal Legislature.[1] Every proposal for legislation in the exercise of this power must be subject to the previous consent of the Governor-General.

Apprehensions of external aggression or internal disturbance are the circumstances which, in an emergency, will enable the Governor-General to confer upon himself or the Federal Legislature, the power to invade the exclusively provincial sphere. But this will not prevent the Provincial Legislature from making laws on any subject within its competence save that if there is a conflict between a federal law, enacted under the provisions of this section, and a provincial law, the federal law for so long as it remains operative shall prevail over the provincial law or the same subject. Such laws will cease to have effect six months after the proclamation declaring the emergency is revoked by the Governor-General.

Power of Federal Legislature to legislate for two or more Provinces by onsent

103. If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Act so passed may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.

At the request of two or more Provinces, communicated by passing resolutions to that effect, the Federal Legislature may pass a law which will be operative in those Provinces on a subject which would otherwise fall within the exclusive legislative competence of a Province only. Such a Federal Act will be subject, as regards any Province to which it applies to subsequent amendment or repeal by the Legislature of that Province.

Residual powers of legislation

104.—(1) The Governor-General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the lists in the Seventh Schedule to this Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs.

(2) In the discharge of his functions under this section the Governor-General shall act in his discretion.

It is of the essence of a federal constitution, that the legislative powers are so distributed between the central organization and its com-

[1] S. 45.

ponent parts, that residual powers are vested either in the one or in the other. But in the present constitution, the Act provides for a statutory allocation of exclusive jurisdictions to the Federal authority and the Provinces respectively, without specifically assigning the residual powers either to the one or to the other. The three Legislative Lists in the Seventh Schedule define their respective jurisdictions but if there is any matter which is not covered by the enumeration in the lists, this section empowers the Governor-General acting in his discretion to allocate to the central authority or to Provinces, as he may think fit, the right to legislate on such subjects. The power vested in the Governor-General necessarily authorizes him not merely to allocate an un-enumerated subject but also, in so doing, to determine conclusively that a given legislative project is not, in fact, covered by the enumeration as it stands.

Application of Naval Discipline Act to Indian naval forces

105.—(1) Without prejudice to the provisions of this Act with respect to the legislative powers of the Federal Legislature, provision may be made by Act of that Legislature for applying the Naval Discipline Act to the Indian naval forces and, so long as provision for that purpose is made either by an Act of the Federal Legislature or by an existing Indian law, the Naval Discipline Act as so applied shall have effect as if references therein to His Majesty's navy and His Majesty's ships included references to His Majesty's Indian navy and the ships thereof, subject however—

(*a*) in the application of the said Act to the forces and ships of the Indian navy and to the trial by court martial of officers and men belonging thereto, to such modifications and adaptations, if any, as may be, or may have been, made by the Act of the Federal or Indian Legislature to adapt the said Act to the circumstances of India, including such adaptations as may be, or may have been, so made for the purpose of authorising or requiring anything which under the said Act is to be done by or to the Admiralty, or the Secretary of the Admiralty, to be done by or to the Governor-General, or some person authorised to act on his behalf; and

(*b*) in the application of the said Act to the forces and ships of His Majesty's navy other than those of the Indian navy, to such modifications and adaptations as may be made, or may have been made under section sixty-six of the Government of India Act, by His Majesty in Council for the purpose of regulating the

relations of those forces and ships to the forces and the ships of the Indian Navy.

(2) Notwithstanding anything in this Act or in any Act of any Legislature in India, where any forces and ships of the Indian navy have been placed at the disposal of the Admiralty, the Naval Discipline Act shall have effect as if references therein to His Majesty's navy and His Majesty's ships included references to His Majesty's Indian navy and the ships thereof, without any such modifications or adaptations as aforesaid.[1]

By a Federal Act, the provisions of the Naval Discipline Act may with modification be made applicable to the India's naval forces. This section follows the lines of s. 66 of the old Act, as amended by s. 1(4) of the Government of India (Indian Navy) Act, 1927.[2] Under old s. 66(*b*), it was provided that in the application of the Naval Discipline Act to forces and ships of His Majesty's navy not raised and provided by the Governor-General in Council, the Act of the Indian Legislature is subject to such modifications and adaptations as may be made by His Majesty in Council.

Provisions as to legislation for giving effect to international agreements

106.—(1) The Federal Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous consent of the Governor, or for a Federated State except with the previous consent of the Ruler thereof.

(2) So much of any law as is valid only by virtue of any such entry as aforesaid may be repealed by the Federal Legislature and may, on the treaty or agreement in question ceasing to have effect, be repealed as respects any Province or State by a law of that Province or State.

(3) Nothing in this section applies in relation to any law which the Federal Legislature has power to make for a Province or, as the case may be, a Federated State, by virtue of any other entry in the Federal or the Concurrent Legislative List as well as by virtue of the said entry.

Item 3 of List I of the Federal Legislative List, in the Seventh Schedule empowers the Federal Legislature exclusively to legislate for the purpose of implementing treaties and agreements with other countries. But this does not empower it to make laws on this subject affecting any Province or Federated State except with the previous consent of the

[1] See s. 110(*b*) (ii) and notes thereto.

[2] 17 & 18 Geo. 5, Chapter 8.

Governor or of the Ruler of that State. But this does not affect the right the Federal Legislature may have, in virtue of any other entry in List I or III, to make laws affecting a Province or a Federated State or in virtue of the other subjects included under item 3 of List I.

International obligations

In the White Paper,[1] it was proposed that in the exclusively Federal List of subjects, should be included: 'External Affairs, including International Obligations, subject to previous concurrence of units as regards non-federal subjects.' In the Joint Committee Report,[2] the item was modified thus: 'External Affairs, including international agreements, but with regard to future agreements relating to subjects within the exclusive jurisdiction of a unit, only so far as they have been made with the previous concurrence of that unit'. For an example of an Act passed to give effect to treaties, see the Indian Naval Armaments Act, 1923 (VII of 1923), as amended by Act VIII of 1931, to give effect in British India to the Treaties for the Limitation of Naval Armaments signed on behalf of His Majesty.

Canada Act

A very interesting comparison is afforded by the corresponding provisions of the Canada Act, as explained in recent decisions of the Privy Council. S. 92 of the Canada Act enumerates the subjects to be dealt with exclusively by the provincial legislatures. S. 91 tabulating the subjects to be dealt with by the Dominion Parliament, provides that 'it shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to legislatures of the provinces'. S. 132 of the Canada Act provides:

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

This section was considered by the Privy Council in the *Aeronautics Case*.[3] During the Peace Conference, a convention relating to aerial navigation was signed by the Allied and Associated Powers, including Canada, and was ratified by His Majesty on behalf of the British Empire in 1922. With a view to performing her obligations as part of the Empire, under this Convention then in course of preparation, the Dominion Parliament passed the Air Board Act in 1919. In 1927, a question was raised as to the legislative authority of the Parliament to sanction regulations for the control of aerial navigation generally in Canada, in particular in their application to flying operations within a province. Important observations were made by Lord Sankey L.C. as to *canon of construction* applicable to such states:

> Inasmuch as the Act embodies a compromise under which the original provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the

[1] W.P. Prop. 111, and item 8 in Appendix VI thereto.
[2] J.C.R. 232, and item 8 in List I in the Revised Lists attached.
[3] [1932] A.C. 54.

foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on, ought not to be allowed to dim or whittle down the provision of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.

The Judicial Committee held that the Dominion legislation was valid. In the *Radio Case*,[1] the Committee held that the Dominion Parliament has exclusive legislative power to regulate and control radio communication in Canada, the Dominion Act being passed to give effect to a convention during the Peace Conference under circumstances similar to those in the *Aeronautics Case*. It was urged that s. 192 of the Canada Act did not apply as the obligation of Canada to ratify the convention was not her obligation as part of the British Empire, but in virtue of her new status as an international person. Lord Dunedin, at p. 312, said :

> The idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. . . . . It is not therefore to be expected that such a matter should be dealt with in explicit words in either s. 91 or s. 92. Such legislation falls within the general words at the opening of s. 91. . . . . In fine, though agreeing that the convention is not a treaty as is defined in s. 132, their Lordships think that it comes to the same thing.

The Judicial Committee, however, seem to have come to a different conclusion in *A.G. for Canada* v. *A.G. for Ontario*[2] where the question was as to the validity of certain industrial legislation passed by the Dominion Parliament, to give effect to conventions adopted by the International Labour Conference in accordance with the relevant articles of the Peace Treaty, which were ratified by the Dominion Parliament; it was contended that this legislation was *ultra vires*, as the subject matter of the Acts was, by s. 92 of the Canada Act, within the exclusive competence of the provincial legislatures. The Dominion contended that this legislation could be justified either (1) under s. 132 of the Canada Act, or (2) under the general powers, sometimes called the residuary powers, given by s. 91, Canada Act, to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the provincial legislatures. The Judicial Committee held the Dominion legislation was invalid. The obligations, as Lord Atkin observed, were not those of Canada as part of the British Empire, but of Canada by virtue of her new status as an international person, and did not arise under a treaty between the British Empire and foreign countries. For the purposes of ss. 91 and 92, the distribution of legislative powers between the Dominion and the provinces, there was no such thing as treaty legislation as such. The distinction was based on classes of subjects, and as a treaty dealt with a particular class of subjects, so would the legislative power of performing it be ascertained. (It may be noted that the provision of s. 106 of the Indian Act regarding future

[1] [1902] A.C. 304.

[2] (1937) 53 T.L.R. 325 ; see also other similar cases considered by the Judicial Committee in 53 T.L.R. 330, 332, 334, 337 and 340.

international agreements follows this distinction.) Lord Atkin made the following noteworthy observations :

> It must not be thought that the result of the present decision was that Canada was incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and provincial together, she was fully equipped. And the legislative powers remained distributed ; and if in the exercise of new functions derived from her new international status she incurred obligations, they must, so far as legislation was concerned, when they dealt with provincial classes of subjects, be dealt with by the totality of powers—in other words, by co-operation between the Dominion and the provinces. While the ship of state now sailed upon larger ventures and into foreign waters, she still retained the watertight compartments which were an essential part of the original structure.

Inconsistency between Federal laws and Provincial or State law

107.—(1) If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter :

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail, and the law of the State shall, to the extent of the repugnancy, be void.[1]

[1] See J.C.R. 229, 232 and 236 and notes to s. 100.

Subject to the provisions of subsection (2), this section provides for the paramountcy or predominance of federal legislation. In any field of legislation in which both the Federal Legislature and the State or Provincial Legislatures have rights of legislation, federal enactments will prevail over state or provincial laws on the same subject-matter, which would otherwise be perfectly valid and effective. Although there is a statutory delimitation of legislative jurisdictions, cases of conflict may arise in respect of federal and provincial laws. Federal legislation dealing with a subject-matter reserved to it (railways, for instance) may validly embrace matters (e.g. the Law of Master and Servant) which are in general reserved to the State or Province if it is so doing merely in the course of dealing with its own subject-matter (e.g. railways) and incidentally thereto. In such cases, the state or a provincial law is to the extent of its inconsistency with the federal law is void. It will be observed that legislation, within subsection (1) refers to subjects which are not included in the Concurrent Legislative List. This is provided for in the subsection (2). There is no concurrent list in the case of the Federated States who have power of exclusive legislation on the subjects not included in the Instrument of Accession as federal subjects.

CHAPTER II

RESTRICTIONS ON LEGISLATIVE POWERS

INTRODUCTION

The old Government of India Act contains various provisions, all taken from earlier Acts, which place limitations upon the powers of the Indian Legislatures. The general effect of these provisions is, *inter alia*, that any legislation passed in India, if it is in any way repugnant to any Act of Parliament applying to India, is to the extent of the repugnancy null and void. But the principle of the supremacy of Imperial legislation is abandoned in the present Act as being inappropriate for adoption as part of the new constitution as it would unnecessarily fetter the powers of the Indian Legislatures in matters of local interest. The Indian Legislatures, Federal or Provincial, have been given power to affect Acts of Parliament (other than the Constitution Act itself) provided that the Governor-General acting in his discretion has given his previous sanction to the introduction of the Bill and his subsequent assent to the Act when passed; in other words, the combined effect of such previous sanction and subsequent assent will be to make the Indian enactment valid even if it is repugnant to an Act of Parliament applying to India. In his decisions on the admissibility of any given measure the Governor-General would, of course, on the constitutional plan indicated in s. 14, be subject to directions from the Secretary of State. Beyond these provisions, no further external limitation has been placed on the powers of the Indian Legislatures in relation to Parliamentary legislation. For the power of the Dominion Parliaments, see APPENDIX I.

But there are certain matters which the Act has placed beyond the competence of the Indian Legislatures and which have been left for Parliament exclusively to deal with—namely, legislation affecting the Sovereign, the Royal Family and the sovereignty of the Crown over British India. Moreover, the Army Act, the Air Force Act and the Naval Discipline Act have been placed beyond the range of alteration by Indian legislation. Similar restrictions have also been placed on the power to make laws affecting British nationality. The Legislature has however authority to apply the Naval Discipline Act to the Indian naval forces, under s. 105.

But the power to vary the provisions of Acts of Parliament does not relate to this Act which contains no provisions (except in certain specified matters, see s. 308), delegating to the Indian Legislatures general powers to alter the Act, and such powers must necessarily remain with Parliament by means of further legislation as and when required.

The powers of the Indian Legislatures rest on the present Act which defines the extent of their respective authorities. In *Reg* v. *Burah*[1] the principle was generally established that the power conferred is not subject to the rule *delegatus non potest delegare*. The same doctrine was applied in the Canadian case of *Hodge* v. *The Queen*[2] where it was held

[1] (1878) 3 App. Cas. 889.

[2] (1884) 9 App. Cas. 117.

that within the limits prescribed in s. 92 of the British North America Act, the legislatures had authority as plenary and as ample as the Imperial Parliament in the plentitude of its power possessed and could bestow.[1] The Act provides for a statutory delimitation of the spheres of competence of the Federal and the Provincial Legislatures, so that a law passed by one Legislature must fulfil two conditions before it is valid : not only must its subject matter fall within the competence of that Legislature but every part of the law (unless it relates to a matter in the concurrent field, i.e. List III to the Seventh Schedule) must be demonstrably excluded from the competence of the other. Thus, in regard to federal subjects classified in List I of the Seventh Schedule, the Federal Legislature possesses plenary powers of legislation. But it has no power to legislate on any subject in List II which has been exclusively assigned to the Provincial Legislature. The field of its legislative jurisdiction is restricted to the subjects classified in Lists I and III of the Seventh Schedule and extends no further. Likewise, the scope of provincial legislation is restricted to subjects mentioned in Lists II and III of the Seventh Schedule. In other words, the Federal Legislature and each of the Provincial Legislatures possess an exclusive jurisdiction over certain subjects and a concurrent jurisdiction in regard to certain other subjects. This statutory delimitation of the federal and the provincial subjects naturally restricts the scope of the legislative activities of the Federal and the Provincial Legislatures, and each is forbidden to act outside the range of its competence.

The authority of the Indian Legislatures is thus restricted by the following considerations :

(i) The Indian Legislatures are subordinate legislatures and are not legislatures of fully sovereign states. Their authority is fully defined in the Act and extends no further. But within the limits prescribed in the Act, their authority is as plenary and as ample as that of the Imperial Parliament.

(ii) The jurisdictions of the Federal and the Provincial Legislatures have been statutorily defined and neither can encroach on the field exclusively assigned to the other. The statutory distinction of federal and provincial subjects fully prescribes the extent of their powers *inter se*.

(iii) Powers have been granted to vary the provisions of Acts of Parliament applying to India. The Federal Legislature must in exercise of this power follow the special procedure set out in s. 108. The same procedure must be adopted in regard to the legislation of other subjects mentioned in that section.

(iv) Legislation in regard to subject matters mentioned in s. 110 has been absolutely excluded from the competence of the Indian Legislature.

(v) The power to amend the Imperial Acts applying to India does not include the power of altering the provisions of this Act. But in regard to matters referred to in s. 308, specific provision has been made empowering the Federal or Provincial Legislature presenting an address recommending amendments in certain specific matters.[2]

[1] See also *Powell* v. *The Apollo Candle Co.* (1885) 10 App. Cas. 282.

[2] See notes to s. 308.

108.—(1) Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, either Chamber of the Federal Legislature, any Bill or amendment which— Sanction of Governor-General or Governor required for certain legislative proposals

(*a*) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India ; or

(*b*) repeals, amends or is repugnant to any Governor-General's or Governor's Act, or any ordinance promulgated in his discretion by the Governor-General or a Governor ; or

(*c*) affects matters as respects which the Governor-General is, by or under this Act, required to act in his discretion ; or

(*d*) repeals, amends or affects any Act relating to any police force ; or

(*e*) affects the procedure for criminal proceedings in which European British subjects are concerned ; or

(*f*) subjects persons not resident in British India to greater taxation than persons resident in British India or subjects companies not wholly controlled and managed in British India to greater taxation than companies wholly controlled and managed therein ; or

(*g*) affects the grant of relief from any Federal tax on income in respect of income taxed or taxable in the United Kingdom.

(2) Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, a Chamber of a Provincial Legislature any Bill or amendment which—

(*a*) repeals, amends, or is repugnant to any provisions of any Act or Parliament extending to British India ; or

(*b*) repeals, amends or is repugnant to any Governor-General's Act, or any ordinance promulgated in his discretion by the Governor-General ; or

(*c*) affects matters as respects which the Governor-General is by or under this Act, required to act in his discretion ; or

(*d*) affects the procedure for criminal proceedings in which European British subjects are concerned ;

and unless the Governor of the Province in his discretion thinks fit to give his previous sanction, there shall not be introduced or moved any Bill or amendment which—

(i) repeals, amends or is repugnant to any Governor's Act, or any ordinance promulgated in his discretion by the Governor ; or

(ii) repeals, amends or affects any Act relating to any police force.

(3) Nothing in this section affects the operation of any other provision in this Act which requires the previous sanction of the Governor-General or of a Governor to the introduction of any Bill or the moving of any amendment.

This section does not prescribe the extent of the powers of the Indian Legislatures. It lays down the procedure to be adopted whenever legislation is contemplated in the field of subjects mentioned in the section. See Introduction to this Chapter.

It should be observed that, subject to s. 110(*b*), the Federal Legislature possesses the power to alter the provisions of the Imperial Acts applying to India (except the Constitution Act).[1]

Cl. (*1*) (*d*) *:* In J.C.R. 91, it is recommended that the previous sanction of the Governor given in his discretion should be required for any legislation which would amend or repeal the general Police Acts in force in the Province or any other Police Acts. It will be open to the Governor-General to give directions to the Governor as to the making, maintenance or amendments of all police rules.

Cl. (*e*) *:* The Indian Criminal Procedure Code contains special procedure for criminal proceedings against European British subjects.

Cl. (*f*) *:* See Introduction to Part V, Chapter III and s. 112 and notes thereto.

Cl. (*3*) *:* This section does not affect the other sections in this Act requiring previous sanction of the Governor-General or of the Governor ; e.g. ss. 141, 153, 182(2), 206(3), 299(3), etc.

Requirements as to sanction and recommendations to be regarded as matters of procedure only

109.—(1) Where under any provision of this Act the previous sanction or recommendation of the Governor-General or of a Governor is required to the introduction or passing of a Bill or the moving of an amendment, the giving of the sanction or recommendation shall not be construed as precluding him from exercising subsequently in regard to the Bill in question any powers conferred upon him by this Act with respect to the withholding of assent to, or the reservation of, Bills.

(2) No Act of the Federal Legislature or a Provincial Legislature, and no provision in any such Act, shall be invalid by reason only that some previous sanction or

[1] See s. 308.

recommendation was not given, if assent to that Act was given—

(*a*) where the previous sanction or recommendation required was that of the Governor, either by the Governor, by the Governor-General, or by His Majesty;

(*b*) where the previous sanction or recommendation required was that of the Governor-General, either by the Governor-General or by His Majesty.

For some sections of this Act, requiring previous sanction, see ss. 141, 153, 182(2), 192, 206(3).

110. Nothing in this Act shall be taken— Savings

(*a*) to affect the power of Parliament to legislate for British India, or any part thereof; or

(*b*) to empower the Federal Legislature, or any Provincial Legislature—

(i) to make any law affecting the Sovereign or the Royal Family, or the succession to the Crown, or the sovereignty, dominion or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act, the Air Force Act, or the Naval Discipline Act, or the law of Prize or Prize courts; or

(ii) except in so far as is expressly permitted by any subsequent provisions of this Act, to make any law amending any provision of this Act, or any Order in Council made thereunder, or any rules made under this Act by the Secretary of State, or by the Governor-General or a Governor in his discretion, or in the exercise of his individual judgment; or

(iii) except in so far as is expressly permitted by any subsequent provisions of this Act, to make any law derogating from any prerogative right of His Majesty to grant special leave to appeal from any court.

This section further reserves the power of deciding as to British nationality to Parliament. The acquisition of British nationality is regulated by the British Nationality and Status of Aliens Acts, 1914[1] and

[1] 4 & 5 Geo. 5, c. 17.

the Amending Acts of 1918,[1] of 1922[2] and of 1933.[3] The Act of 1914 provides that the nationality which can be acquired by birth in British territory or British ships, marriage, descent, residence or naturalization, produces the status of a British subject throughout the British Empire. But nothing prevents the differential treatment of different classes of British subjects as to immigration or otherwise, and the Act does not confer on the British subjects an indefeasible right of entry to every part of the British Empire.[4] Under the Immigration into India Act (Act III of 1924), power has been given to the Government to regulate entry and residence of British subjects domiciled in other British possessions on the basis of reciprocity; the position of the people of Burma is exactly similar to that of India. The legislature of Burma can modify the British legislation as to naturalization within the same limits as can be done in India. But it will equally be unable to affect the general principles of that legislation. The subjects or Rulers are not British subjects, but are eligible for naturalization. The Rulers of States are exempt from the jurisdiction of municipal courts in England. The provision of the Act of 1914 regarding acquisition of British nationality by birth, marriage, etc., is operative in British India, but local nationality may be conferred by the authority of the Indian Legislature. Thus there is a provision in the Indian Naturalization Act (Act VII of 1926) for the grant of naturalization to certain persons not being subjects of any state in Europe or America nor of any state in which an Indian British subject is prevented by law from becoming a national by naturalization ; and such nationality is valid in British India.

Aliens

Aliens in India owe temporary allegiance to the Crown and are entitled to the protection of Indian law. They are triable in the same manner as natural-born subjects. So long as he resides in the country with permission, express or implied, he is a subject by local allegiance, with a subject's rights and obligations. But the right of an alien resident to protection is contingent on his observing the duty of allegiance within the realm. *Johnstone* v. *Pedlar,*[5] *De Joges* v. *Attorney-General.*[6] They are subject to certain discrimination in respect of membership of local bodies, but there is no law which forbids ownership of land by foreigners in India. *Mayor of Lyons* v. *East India Company.*[7] But under the Foreigners Act (Act III of 1864 and Act III of 1915), aliens may be prevented from landing on Indian soil or residing in India. The central and local Governments have power to expel foreigners from British India and apprehend and detain any one who refuses to obey the order. They may also be required to report their arrival and to reside in India subject to observance of certain rules and regulations.

Alien enemies residing in British India may sue in the courts of British India with the permission of the Governor-General in Council.[8] As to who are alien enemies, see *Anjelina* v. *Joseph,*[9] and *Deutsch Asiatiche Bank* v. *Hira Lall.*[10] Suits against the Rulers of Indian States, Chiefs, foreign ambassadors and envoys may be instituted in a com-

1 8 & 9 Geo. 5, c. 38.
2 12 & 13 Geo. 5, c. 44.
3 23 & 24 Geo. 5, c. 49.
4 See s. 111.
5 [1921] 2 A.C. 262.
6 [1907] A.C. 326.
7 (1836) 1 Moo. Ind. App. 175.
8 See s. 83 of the Civil Procedure Code Act, Act V of 1908.
9 (1917) 39 All. 377.
10 (1919) 46 Cal. 526.

petent Indian court with the consent of the Governor-General in Council, but consent will not be given unless the Ruler, ambassador or envoy:

(a) has instituted a suit in the court against the person desiring to sue him; or

(b) by himself or by another trades within the local limits of the jurisdiction of the court, or

(c) is in possession of immovable property situate within those local limits and is to be sued with reference to such property or for money charged thereon; and no decree can be executed against such person without the consent of the Governor-General in Council.[1]

The provisions of the Naval Discipline Act may be made applicable by the Federal Legislature to Indian naval forces with modifications and adaptations. The Naval Discipline Act however is to apply to Indian naval forces placed at the disposal of the admiralty.[2]

The regulation of prize law and prize courts has been excluded from the jurisdiction of the legislatures in India. Any Colonial Court of Admiralty (a term which covers certain Indian courts) may be empowered to sit as a Prize Court, as was done in the War (1914–18).[3] The Governor-General is ex-officio 'Vice-Admiral'. The Courts (Colonial) Jurisdiction Act, 1874,[4] which regulates punishment for admiralty offences where there is no corresponding colonial offence applies to India, and under the Colonial Courts of Admiralty Act,[5] the Indian Legislature declared the High Courts at Calcutta, Madras, Bombay, Patna, and Rangoon, the Court of the Resident at Aden and the district court at Karachi, to be Courts of Admiralty with the jurisdiction of that Act. The courts have also jurisdiction under the Merchant Shipping Act[6] over British subjects for offence committed on foreign ships to which they do not belong and on British ships at foreign ports, over aliens for offences committed on British ship on the high seas and over members of ships' crews or ex-members for offences committed anywhere outside the British Dominions, and under the Territorial Waters Jurisdiction Act,[7] over offences committed by aliens or alien ship in territorial waters. The Indian Penal Code obviously applies where the offences are also offences under the code. In all other cases, the crime is to be an offence under English Law, the procedure and penalty under the Act of 1874 being determined by local law, as was held in *Queen* v. *Barton*.[8]

The position of the Indian Navy is not altered in substance by the Act. The Government of India (Indian Navy) Act, 1927,[9] enhances the status of the naval force in India and ranks it with those of the Dominions. That measure has been repealed by this Act but its essential provision of legislative power to India[10] is retained and the limitation

[1] See s. 86 of the Civil Procedure Code.

[2] See s. 105 and notes thereto.

[3] See the Prize Courts Act, 1864, the Naval Prize Act, the Prize Courts (Procedure) Act, 1915. See also the *Chile* [1914], 212.

[4] 37 & 38 Vict., c. 22.

[5] 53 & 54 Vict., c. 27, 1890, (see also Act XVI of 1891, s. 2).

[6] 57 & 58 Vict., c. 69, ss. 686-687.

[7] 41 & 42 Vict., c. 73, 1878.

[8] (1899) 16 Cal. 238; *Queen* v. *Gunning* (1894) 21 Cal. 782.

[9] 17 & 18 Geo. 5, c. 8.

[10] See item I of the Federal Legislative List.

on the use of Indian revenues [1] also remains. The power of the Governor-General to transfer the force to the control of the Admiralty is preserved on condition that Indian funds can be used only if the defence of India is involved.[2]

Cl. (*b*) (*iii*) *:* See notes to s. 2 under PREROGATIVE POWERS; and s. 206(2) and notes thereto.

[1] See s. 150(1).

[2] See s. 105.

CHAPTER III

PROVISIONS WITH RESPECT TO DISCRIMINATION, ETC.

INTRODUCTION

The provisions of this chapter safeguard the commercial and the trading interests of the British subjects, domiciled in the United Kingdom. The Federal or the Provincial Government will have no power to differentiate between nationals and the British subjects or to reserve certain domestic spheres of trade for its nationals, to the exclusion of others. A special responsibility is imposed on the Governor-General for the prevention of action which would subject goods of United Kingdom or of Burma imported into India to discriminatory or penal treatment.[1] In addition to conferring this special responsibility, the Act contains provisions prohibiting discrimination against British subjects domiciled in the United Kingdom and against British trade and commercial interests in India. The Simon Commission were not, however, in favour of statutory provisions against discriminatory legislation :

> Spokesmen of various minorities, religious and racial, have urged before us that the powers of the Indian legislatures should be so defined in the Governing statutes, as to exclude the possibility of discriminatory legislation by making it invalid.... It was represented to us by the European Association and the Associated Chambers of Commerce that constitutional safeguards are required against legislation, central or provincial, which would discriminate against particular sections of the community in matters of trade, taxation or commerce.... Many other interests have asked for constitutional safeguards and we are clear that statutory protection could not be limited to particular communities or to discrimination in matters of trade and commerce only. The statutory provision would have to be drawn so widely as to be little more than a statement of abstract principle affording no precise guidance to courts which would be asked to decide whether a particular group constituted a minority and whether the action complained of was discriminatory .... These objections are decisive against the proposal to prevent discriminating legislation by attempting to define it in a constitutional document.[2]

The Joint Select Committee were however, of a contrary view, and their proposals on the subject, with certain minor modifications, have been embodied in the Act.[3]

Discrimination may be of two kinds, administrative or legislative.

Discrimination

With regard to administrative discrimination, the Act imposes a special responsibility on the Governor-General and the Governors to deal with proposals which they may regard as likely to have discriminatory effects in the administrative sphere. The subject of legislative discrimination is dealt with in the various provisions of this chapter. A law is deemed to discriminate

[1] See ss. 12(*e*) and (*f*) and 52(*d*), and notes thereto.
[2] Vol. II, par. 156.
[3] J.C.R., pars. 342-65.

against persons or companies if it would result in any of them being liable to greater taxation or other disabilities than that to which they would be liable if domiciled or incorporated in British India. British subjects domiciled in the United Kingdom and British subjects domiciled in British India are thus treated as standing on the same footing and the relations between India and Great Britain are declared to be based on reciprocity.

The following classes of rights are declared and any legislation, federal or provincial, which is inconsistent with these declarations is invalid and can be challenged as such in the Courts.

(*a*) The Act contains a general declaration as to rights of British subjects domiciled in the United Kingdom. No British subject shall be disabled in British India from holding office or practising any profession, trade or calling, by reason of his religion, descent, trade or calling or place of birth. The privilege is, however, not extended to British subjects resident in the overseas dominions. No statutory disabilities based upon racial or religious grounds may be imposed on British subjects domiciled in the United Kingdom in respect of the following matters: taxation, travel or residence, the holding of property, the holding of public office, the carrying of trade, profession, occupation, or calling in British India.

The provision relating to discriminatory taxation also applies to British subjects domiciled in Burma (including companies incorporated in Burma).

No laws restricting the right of entry into British India shall apply to British subjects domiciled in the United Kingdom. But the right of competent authorities to exclude or remove an undesirable person is reserved and the entry of any person may be subjected to quarantine regulations.

(*b*) Companies incorporated in the United Kingdom and trading in India cannot be subjected to any discriminatory taxation, or imposts or rates and cesses or to any other statutory disability where such discrimination is based on the domicile, residence, language, race or religion, descent or place of birth of the directors, shareholders, officers, agents or servants. Such companies, if otherwise qualified shall not be excluded from receiving bounties, grant or subsidies from the Government, if such exclusion is based on the grounds referred to above. But a distinction has been drawn between companies, already engaged at the date of the Indian Act which authorizes the grant in that branch of trade or industry which is sought to encourage, and companies which engage in it subsequently to the passing of the Subsidy Act. In the case of the latter, an Act of Federal Legislature or of the Provincial Legislature may require that the company shall not be eligible for any grant, bounty or subsidy out of public revenues under the Act, unless and until such requirements as are specified in s. 116(2) as to their incorporation and composition and other conditions are fulfilled. But no distinction is made between persons and bodies (domiciled in the United Kingdom) trading in India but neither resident nor possessing establishments in India, on one hand, and those having residence and possessing establishments in India, on the other. A British company will be entitled to subsidies and grants in aid to the same extent as an Indian company, provided that it is incorporated before the Bounty Act is passed.

Reciprocity

The privileges conferred on the British subjects domiciled, and companies incorporated, in the United Kingdom are based on reciprocity, and accordingly it is

provided that no British subject or company is to benefit from these provisions which prohibit discrimination if and so long as similar restrictions are imposed by or under the law of the United Kingdom in regard to companies incorporated in and persons domiciled in British India. The Secretary of State explained in a Memorandum to the Joint Select Committee that the prohibition against discriminatory legislation is not intended to interfere with freedom of contract or for example, to prevent persons desirous of forming a company including in the Articles of the company such provisions as they think fit, even though these provisions may be contrary to the principles laid down in this chapter. It was further stated that the Instrument of Instructions to the Governor-General and the Governors would include a clause requiring them to withhold assent or to reserve for the signification of His Majesty's pleasure any Bill, which, though not in form discriminatory, the Governor-General or the Governor, in his discretion, considers likely to subject to unfair discrimination any class of His Majesty's subjects protected by the provisions of this chapter. He further stated that the existing convention as to the purchase of stores is not to be disturbed. India can place her order in the cheapest market.

(*c*) There is a special provision with regard to ships and shipping. Although under s. 108(*a*), power has been granted to the Federal Legislature to prohibit or restrict the operation of the Merchant Shipping Act, 1894 in India, ships registered in the United Kingdom shall not be subjected, directly and indirectly, by law in British India, to any discrimination whatsoever either as regards the ship or her officers or crew or her passengers or cargo to which ships registered in British India would not be subjected in the United Kingdom.

(*d*) The Indian Legislatures are free to prescribe the conditions under which the practice of professions is generally to be carried on, provided that every person now practising a profession in British India or holding any office or performing any function in British India on the strength of British qualification shall be entitled to do so.

The medical profession

The case of medical practitioners is separately dealt with. The following observations were made by the Joint Select Committee on this subject:

The question of the mutual recognition of medical practitioners in the United Kingdom and British India has unhappily become a matter of political controversy in India during the last few years; and in view of its importance to both countries, it seems desirable that we should describe shortly the present situation. The Medical Act, 1886, empowers His Majesty, by Order in Council, to apply the Act to any British possession 'which in the opinion of His Majesty affords to the registered medical practitioners of the United Kingdom such privileges of practising in the said British possession . . . . as to His Majesty seem just'. The Act had been applied to India, in view of the recognition there accorded to practitioners registered in the United Kingdom; and this entitled any person who holds an Indian Medical diploma recognized for the time being by the General Medical Council as 'furnishing a sufficient guarantee of the possession of the requisite knowledge and skill for the efficient practice of medicine, surgery and midwifery' to be registered on application in the United Kingdom medical register. The Act also provides that, where the General Medical Council have refused to recognize a medical diploma for this purpose, the Privy Council,

on application being made to them, may if they think fit, after considering the application and after communicating with the General Medical Council order the latter to recognize the diploma and the Council are under a statutory obligation to do so. It will thus be seen that though the Act is based upon the principle of reciprocity, the General Medical Council is not compelled to give an automatic recognition to each and every diploma conferred in the other countries to which the Act applies, but is entitled, subject to an appeal to the Privy Council, to satisfy itself that any particular diploma is such as to furnish a sufficient guarantee of the possession of requisite medical knowledge and skill ..... The General Medical Council in the United Kingdom does not itself confer medical degrees. It keeps the medical register ; that is to say, a register of medical practitioners who have passed a qualifying examination in medicine, surgery, midwifery, held by Universities in the United Kingdom and certain other bodies, in which a standard of proficiency satisfactory to the Council has been attained ; and the Council, though they do not themselves examine, are thus able in effect to secure that the qualifying examinations and the standard of proficiency are adequate.[1]

In 1892, Indian Medical degrees were recognized by the General Medical Council for purposes of registration in Great Britain. Since 1922, the recognition has been accorded only for a limited period and has been accorded from year to year, on the reports of *ad hoc* inspectors appointed on behalf of the Council to investigate medical study examinations. In 1930, the Council resolved to withdraw its conditional recognition of Indian medical degrees in consequence of the rejection of its recommendation to establish some central authority in India similar to the General Medical Council which would be responsible for the efficiency of the medical training given in India and which would guarantee that the possession of Indian medical degrees ensured the possession of the requisite minimum qualifications accepted for registration in Great Britain. In 1933, however, the Indian Medical Council Act (Act XXVII of 1933) was passed, which provided for the constitution of a Medical Council in India. The Joint Parliamentary Committee say[2]:

This Act sets out in the First Schedule the medical qualifications granted by medical institutions in British India which are to be recognized for the purposes of the Act and gives the Council power to secure by inspection and in the last resort by the withdrawal of recognition, an adequate standard of proficiency. In the Second Schedule are set out the medical institutions outside British India which are to be recognized for the purposes of the Act and in this list are included the registerable qualifications granted by licensing bodies in the United Kingdom which admit to the United Kingdom medical register. These are to continue unaltered for a period of four years, but the Council are empowered to enter into negotiations with the authority in any country outside British India entrusted with the maintenance of a register of medical practitioners for the settlement of scheme for the reciprocal recognition of medical qualifications. The Governor-General is to be informed of the decisions of the Council to recognize or refuse to recognize the medical qualifications proposed by the authority abroad for recogni-

[1] Par. 361.

[2] Report, par. 363.

tion in British India; and he is to frame a new Schedule (to become effective for four years after the commencement of the Act) which will comprise the medical qualifications thereafter to be recognized. Provision is also made enabling the Governor-General in Council, after the expiration of four years, to amend the Schedule and to add further qualifications or to recognize qualifications granted before or after a specified date. It will thus be seen that the Governor-General in Council, would on the representations of the Indian Medical Council, be free to withdraw at any time after the expiration of four years the recognition in British India secured to medical practitioners on the United Kingdom medical register, though there is a saving for all medical qualifications granted previously.

But the present Act makes slight modifications in this respect and provides that if the Indian Medical Council withholds recognition of any of the United Kingdom qualifications set out in the Second Schedule to the Indian Act; an appeal may be made to the Privy Council by any person (or body) who is prejudicially affected by the decision of the Indian Medical Council. The provisions relating to medical qualifications apply not only to British subjects domiciled in the United Kingdom but also to Burman subjects of His Majesty holding medical diplomas granted in Burma or the United Kingdom. Further, the Act makes special provisions for the Indian Medical Service, the Royal Army Medical Corps and the Royal Air Force Medical Service. The members of these services by virtue of the commissions which they hold, shall be deemed to possess all necessary statutory qualifications entitling them to practise.

The rights and privileges conferred on the British subjects domiciled in the United Kingdom can only be claimed in British India, and the various provisions of the Act have no application to the Federated States.

British subjects domiciled in the United Kingdom

111.—(1) Subject to the provisions of this chapter, a British subject domiciled in the United Kingdom shall be exempt from the operation of so much of any Federal or Provincial law as—

(*a*) imposes any restriction on the right of entry into British India; or

(*b*) imposes by reference to place of birth, race, descent, language, religion, domicile, residence or duration of residence, any disability, liability, restriction or condition in regard to travel, residence, the acquisition, holding, or disposal of property, the holding of public office, or the carrying on of any occupation, trade, business or profession:

Provided that no person shall by virtue of this sub-section be entitled to exemption from any such restriction, condition, liability or disability as aforesaid if and so

long as British subjects domiciled in British India are by or under the law of the United Kingdom subject in the United Kingdom to a like restriction, condition, liability, or disability imposed in regard to the same subject matter by reference to the same principle of distinction.

(2) For the purposes of the preceding subsection, a provision, whether of the law of British India or of the law of the United Kingdom, empowering any public authority to impose quarantine regulations, or to exclude or deport individuals, wherever domiciled, who appear to that authority to be undesirable persons, shall not be deemed to be a restriction on the right of entry.

(3) Notwithstanding anything in this section, if the Governor-General or, as the case may be, the Governor of any Province, by public notification certifies that for the prevention of any grave menace to the peace or tranquillity of any part of India or, as the case may be, of any part of the Province, or for the purpose of combating crimes of violence intended to overthrow the Government, it is expedient that the operation of the provisions of subsection (1) of this section should be wholly or partially suspended in relation to any law, then while the notification is in force the operation of those provisions shall be suspended accordingly.

The functions of the Governor-General and of a Governor under this subsection shall be exercised by him in his discretion.[1]

This and the succeeding sections generally declare the rights of the British subjects domiciled in the United Kingdom. These prevent the imposition of discriminatory taxation or of any statutory disability upon them where such disability is based upon racial grounds. They possess an unrestricted right of entry into the territories of British India, subject only to the right of competent authorities to exclude or remove undesirable persons or to impose quarantine regulations. They cannot be subjected to statutory disabilities on racial grounds in respect of any of the matters referred to in Cl. (*b*).

But these rights and privileges are confined to the British subjects domiciled in the United Kingdom and are not extended to His Majesty's subjects in the overseas Dominions.

The provisions of this chapter do not apply to the Federated States and the rights mentioned herein can be claimed only in British India.

Taxation

112.—(1) No Federal or Provincial law which imposes any liability to taxation shall be such as to discriminate against British subjects domiciled in the United Kingdom or Burma or companies incorporated, whether before or

[1] See Introduction to this Chapter and J.C.R. 342–52.

after the passing of this Act, by or under the laws of the United Kingdom or Burma, and any law passed or made in contravention of this section shall, to the extent of the contravention, be invalid.

(2) Without prejudice to the generality of the foregoing provisions, a law shall be deemed to be such as to discriminate against such persons or companies as aforesaid if it would result in any of them being liable to greater taxation than that to which they would be liable if domiciled in British India or incorporated by or under the laws of British India, as the case may be.

(3) For the purposes of this section a company incorporated before the commencement of Part III of this Act under any existing Indian law and registered thereunder in Burma shall be deemed to be a company incorporated by or under the laws of Burma.

This section applies to British subjects domiciled in the United Kingdom and Burma, and to companies incorporated in these two countries.

113.—(1) Subject to the following provisions of this chapter, a company incorporated, whether before or after the passing of this Act, by or under the laws of the United Kingdom, and the members of the governing body of any such company and the holders of its shares, stock, debentures, debenture stock or bonds and its officers, agents, and servants, shall be deemed to comply with so much of any Federal or Provincial law as imposes in regard to companies carrying on or proposing to carry on business in British India requirements or conditions relating to or connected with—

Companies incorporated in the United Kingdom

(*a*) the place of incorporation of a company or the situation of its registered office, or the currency in which its capital or loan capital is expressed; or

(*b*) the place of birth, race, descent, language, religion, domicile, residence or duration of residence of members of the governing body of a company, or of the holders of its shares, stock, debentures, debenture stock or bonds, or of its officers, agents or servants:

Provided that no company or person shall by virtue of this section be deemed to comply with any such requirement or condition as aforesaid if and so long as a like requirement or condition is imposed by or under the law of the

United Kingdom in regard to companies incorporated by or under the laws of British India and carrying on or proposing to carry on business in the United Kingdom.

(2) If and in so far as any total or partial exemption from, or preferential treatment in respect of, taxation imposed on companies by or under any Federal or Provincial law depends on compliance with conditions as to any of the matters mentioned in subsection (1) of this section, any company incorporated by or under the laws of the United Kingdom carrying on business in British India shall be deemed to satisfy those conditions and be entitled to the exemption or preferential treatment accordingly, so long as the taxation imposed by or under the laws of the United Kingdom on companies incorporated by or under the laws of British India and carrying on business in the United Kingdom does not depend on compliance with conditions as to any of the matters so mentioned.[1]

It is within the competence of the Indian Legislature to lay down that companies incorporated under an Indian law shall be constituted in a particular way. It might lay down particular terms of incorporation, which might include, for instance, that the Indian companies must have a certain proportion of shareholders coming from a certain class, and a certain class of directors. The effect of the provisions of this section is that if the Indian Legislature lays down such rules of incorporation which, of course, would apply to all companies registered in India, then the company shall be held to comply sufficiently with those terms as to domicile, residence and so forth, if, where the law lays down that they must be residents of India or the like, they are domiciled in the United Kingdom. This section prevents a company from being prejudiced if the law lays down that at its incorporation it should include a certain proportion of Indians and the like. In that case, the residents of the United Kingdom would come as Indians and therefore comply with the law. The company having complied with the law to that extent would not be prejudiced in point of taxation and otherwise. The consequence is that if a company is incorporated in the United Kingdom and trades in India, such a company will not be subject to any disabilities on account of the fact that it is incorporated in the United Kingdom or that its shareholders are not of a particular composition or class or nationality. These provisions of this chapter will not apply if any restriction or disability or condition of the kind and based upon racial grounds is imposed by the law of the United Kingdom, affecting in Great Britain, Indian subjects of His Majesty or companies incorporated in India.

Companies incorporated in India

114.—(1) Subject to the following provisions of this chapter, a British subject domiciled in the United Kingdom shall be deemed to comply with so much of any Federal or Provincial law as imposes in regard to companies incor-

[1] See J.C.R. 252.

porated or proposed to be incorporated, whether before or after the passing of this Act, by or under the laws of British India, any requirements or conditions relating to, or connected with, the place of birth, race, descent, language, religion, domicile, residence or duration of residence of members of the governing body of a company, or of the holders of its shares, stock, debentures, debenture stock or bonds, or of its officers, agents or servants :

Provided that no person shall by virtue of this section be deemed to comply with any such requirement or condition as aforesaid if and so long as a like requirement or condition is imposed by or under the law of the United Kingdom in regard to companies incorporated or proposed to be incorporated by or under the laws of the United Kingdom on British subjects domiciled in British India.

(2) If and in so far as, in the case of any such companies as aforesaid, any total or partial exemption from, or preferential treatment in respect of, taxation imposed by or under any Federal or Provincial law depends on compliance with conditions as to any of the matters aforesaid, then, so far as regards such members of its governing body and such of the holders of its shares, stock, debentures, debenture stock or bonds, and such of its officers, agents and servants, as are British subjects domiciled in the United Kingdom, any such company shall be deemed to satisfy those conditions and be entitled to the exemption or preferential treatment accordingly, so long as the taxation imposed by or under the laws of the United Kingdom on companies incorporated by or under those laws does not, as regards such of the members of a company's governing body, or such of the holders of its shares, stock, debentures, debenture stock or bonds, or such of its officers, agents, or servants, as are British subjects domiciled in British India, depend on compliance with conditions as to any of the matters aforesaid.

(3) For the purposes of this section, but not for the purposes of any other provision of this chapter, a company incorporated before the commencement of Part III of this Act under any existing Indian law and registered thereunder in Burma, shall be deemed to be a company incorporated by or under the laws of British India.

See notes to s. 113.

115.—(1) No ship registered in the United Kingdom shall be subjected by or under any Federal or Provincial Ships and aircraft

law to any treatment affecting either the ship herself, or her master, officers, crew, passengers or cargo, which is discriminatory in favour of ships registered in British India, except in so far as ships registered in British India are for the time being subjected by or under any law of the United Kingdom to treatment of a like character which is similarly discriminatory in favour of ships registered in the United Kingdom.

(2) This section shall apply in relation to aircraft as it applies in relation to ships.

(3) The provisions of this section are in addition to and not in derogation of the provisions of any of the preceding sections of this chapter.

All Acts of Parliament which apply to India may now be varied or repealed by the Indian Legislatures, subject, of course, to the prior sanction of the Governor-General. This matter is of substantial importance in the case of merchant shipping—as the provisions of s. 110(1) do away with the supremacy of British legislation in respect of this subject. See Introduction to this Chapter under SHIPS AND SHIPPING.

This section prohibits discriminatory legislation in India in regard to ships and shipping. Ships registered in the United Kingdom shall not be subjected, directly or indirectly, by law in British India to any discrimination whatsoever either as regards the ship or her officers, or her crew, or her passengers or a cargo, to which ships registered in British India would not be subjected in the United Kingdom. Thus, the ship-owners in the United Kingdom would have the right to employ in Indian trades, officers holding British certificates of competency and to secure to such officers that they shall be subjected to any discriminatory treatment. The same rule applies to aircraft.

But see s. 118, which provides that the operation of this section may be suspended by Order in Council, if convention on a basis of reciprocity is achieved and legislation passed in the United Kingdom and India to give effect to it.

Subsidies for the encouragement of trade or industry

116.—(1) Notwithstanding anything in any Act of the Federal Legislature or of a Provincial Legislature, companies incorporated, whether before or after the passing of this Act, by or under the laws of the United Kingdom and carrying on business in India shall be eligible for any grant, bounty or subsidy payable out of the revenues of the Federation or of a Province for the encouragement of any trade or industry to the same extent as companies incorporated by or under the laws of British India are eligible therefor:

Provided that this subsection shall not apply in relation to any grant, bounty or subsidy for the encouragement of any trade or industry, if and so long as under the law of the United Kingdom for the time being in force com-

panies incorporated by or under the laws of British India and carrying on business in the United Kingdom are not equally eligible with companies incorporated by or under the laws of the United Kingdom for the benefit of any grant, bounty or subsidy payable out of public moneys in the United Kingdom for the encouragement of the same trade or industry.

(2) Notwithstanding anything in this chapter, an Act of the Federal Legislature or of a Provincial Legislature may require, in the case of a company which at the date of the passing of that Act was not engaged in British India in that branch of trade or industry which it is the purpose of the grant, bounty or subsidy to encourage, that the company shall not be eligible for any grant, bounty or subsidy under the Act unless and until—

(*a*) the company is incorporated by or under the laws of British India or, if the Act so provides, is incorporated by or under the laws of British India or of a Federated State; and

(*b*) such proportion, not exceeding one half, of the members of its governing body as the Act may prescribe, are British subjects domiciled in India or, if the Act so provides, are either British subjects domiciled in India or subjects of a Federated State; and

(*c*) the company gives such reasonable facilities as may be so prescribed for the training of British subjects domiciled in India or, if the Act so provides, of British subjects domiciled in India or subjects of a Federated State.

(3) For the purposes of this section a company incorporated by or under the laws of the United Kingdom shall be deemed to be carrying on business in India if it owns ships which habitually trade to and from ports in India.[1]

Provision in this section has been made in pursuance of the recommendations of the External Capital Committee, which recommended that Indian capital should have full scope for investment in Indian industries and that foreign capital should only supplement it to accelerate the pace. The Committee made a further recommendation that in the case of the grant of any bounty or subsidy to a company, it was reasonable that Government should make certain stipulations and lay special stress on the Indian character of the companies thus formed. Sir Samuel Hoare stated that provisions in the subsidy Act would substantially be based on the recommendations of the Committee. See notes to s. 11 under FISCAL CONVENTION.

[1] See Introduction to this Chapter and J.C.R. 356.

This section, however, places the British capital and the British subjects on a policy of equality with Indian capital and the Indian subjects.

Supplemental

117. The foregoing provisions of this Chapter shall apply in relation to any ordinance, order, byelaw, rule or regulation passed or made after the passing of this Act and having by virtue of any existing Indian law, or of any law of the Federal or any Provincial Legislature, the force of law as they apply in relation to Federal and Provincial laws, but, save as aforesaid, nothing in those provisions shall affect the operation of any existing Indian law.

The following laws will be valid, notwithstanding the provisions of ss. 111–116 (inclusive):

(*a*) Laws in force in India at the date of the passing of the Act, other than the law relating to medical practitioners.[1]

(*b*) Laws, though discriminatory in character, which are declared by the Governor-General or the Governor as the case may be, in his discretion to be necessary for the discharge of his special responsibility for the prevention of any grave menace to the peace and tranquillity or for the purpose of combating crimes of violence intended to overthrow the government.

(*c*) Any law which

(i) prohibits, either absolutely or conditionally, the sale or mortgage of agricultural land in any area to any person not belonging to some class recognized as being a class of persons engaged in or connected with agriculture in that area,

(ii) recognizes the existence of some right, privilege or disability to the members of a community by virtue of some privilege, law or custom having the force of law.

Power to secure reciprocal treatment by convention

118.—(1) If after the establishment of the Federation a convention is made between His Majesty's Government in the United Kingdom and the Federal Government whereby similarity of treatment is assured in the United Kingdom to British subjects domiciled in British India and to companies incorporated by or under the laws of British India and in British India to British subjects domiciled in the United Kingdom and to companies incorporated by or under the laws of the United Kingdom, respectively, in respect of the matters, or any of the matters, with regard to which provision is made in the preceding sections of this chapter, His Majesty may, if he is satisfied that all necessary legislation has been enacted both in the United

[1] See s. 120.

Kingdom and in India for the purpose of giving effect to the convention, by Order in Council declare that the purposes of those sections are to such extent as may be specified in the Order sufficiently fulfilled by that convention and legislation, and while any such Order is in force, the operation of those sections shall to that extent be suspended.

(2) An Order in Council under this section shall cease to have effect if and when the convention to which it relates expires or is terminated by either party thereto.[1]

In recommending the incorporation of the commercial safeguard in the constitution, the Joint Select Committee observed as follows[2]:

> We express our entire agreement with the statement of the British India Delegation in their Joint Memorandum 'that a friendly settlement by negotiation is by far the most appropriate and satisfactory method of dealing with this complicated matter' and we shall have certain suggestions to make later on this aspect of it. Secondly, we are of opinion that these arrangements can only be extended to include the relations between India and other parts of His Majesty's Dominions by mutual agreement. Lastly, we think that, so far as possible, any statutory enactment should be based upon the principle of reciprocity.

At the first Round Table Conference (1931) the Report of the Minorities Sub-Committee was adopted, which contained a paragraph to the effect that there should be no discrimination between the rights of the British mercantile community in India and the rights of Indian-born subjects, and that 'an appropriate convention based on reciprocity should be entered into for the purpose of regulating these rights'. As the Joint Select Committee observe[3]:

> Since we hold strongly that the conventional is preferable to the statutory method and that agreement and goodwill form the most satisfactory basis for commercial relations between India and this country, we think that there should be nothing in the constitution which might close the door against a convention. We recommend accordingly that His Majesty, if satisfied that a convention has been made between His Majesty's Government in the United Kingdom and the new Government of India covering the matters with which we have already dealt with in this chapter of our Report, and that the necessary legislation for implementing it has been passed by Parliament and the Indian legislature, should be empowered to declare by Order in Council that the statutory provisions in the constitution Act shall not apply so long as the Convention remains in force between the two countries .... It would enable the Indian Government and legislature, if they so desire, to substitute a voluntary agreement for a statutory enactment and would therefore give to the arrangements for the reciprocal protection of British subjects in India and the United Kingdom respectively the

[1] See J.C.R. 360 and notes to s. 11 under FISCAL CONVENTION.

[2] Report, par. 360.

[3] Par. 360.

conventional basis which in our judgment it is most desirable that they should have.

This section gives effect to the recommendation of the Joint Select Committee as stated above.

Professional and technical qualifications in general

119.—(1) No Bill or amendment which prescribes, or empowers any authority to prescribe, the professional or technical qualifications which are to be requisite for any purpose in British India or which imposes, or empowers any authority to impose, by reference to any professional or technical qualification, any disability, liability, restriction or condition in regard to the practising of any profession, the carrying on of any occupation, trade or business, or the holding of any office in British India, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(2) The Governor-General or a Governor shall not give his sanction for the purposes of the preceding sub-section unless he is satisfied that the proposed legislation is so framed as to secure that no person who, immediately before the coming into operation of any disability, liability, restriction or condition to be imposed by or under that legislation, was lawfully practising any profession, carrying on any occupation, trade, or business or holding any office in British India shall, except in so far as may be necessary in the interests of the public, be debarred from continuing to practise that profession, carry on that occupation, trade or business, or hold that office, or from doing anything in the course of that profession, occupation, trade or business, or in the discharge of the duties of that office which he could lawfully have done if that disability, liability, restriction or condition had not come into operation.

(3) All regulations made under the provisions of any Federal or Provincial law which prescribe the professional or technical qualifications which are to be requisite for any purpose in British India, or impose, by reference to any professional or technical qualification, any disability, liability, restriction or condition in regard to the practising of any profession, the carrying on of any occupation, trade or business, or the holding of any office in British India, shall, not less than four months before they are expressed to come into operation, be published in such manner as may be required by general or special directions of the

Governor-General, or, as the case may be, the Governor, and, if within two months from the date of the publication complaint is made to the Governor-General or, as the case may be, the Governor that the regulations or any of them will operate unfairly as against any class of persons affected thereby, the Governor-General or Governor, if he is of opinion that the complaint is well founded, may, at any time before the regulations are expressed to come into operation, by public notification disallow the regulations or any of them.

In this subsection the expression ' regulations ' includes rules, byelaws, orders and ordinances.

In the discharge of his functions under this subsection the Governor-General or a Governor shall exercise his individual judgment.

(4) If the Governor-General exercising his individual judgment by public notification directs that the provisions of the last preceding subsection shall apply in relation to any existing Indian law, those provisions shall apply in relation to that law accordingly, and the functions which under those provisions are to be performed in relation to a Federal law by the Governor-General and in relation to a Provincial law by the Governor shall, in relation to that existing Indian law, be performed, according as may be directed by the notification, by the Governor-General exercising his individual judgment, by the Governor exercising his individual judgment or partly by the one and partly by the other of them.

See Introduction to this Chapter.

120.—(1) So long as the condition set out in subsection (3) of this section continues to be fulfilled, a British subject domiciled in the United Kingdom or India who, by virtue of a medical diploma granted to him in the United Kingdom, is, or is entitled to be, registered in the United Kingdom as a qualified medical practitioner shall not by or under any existing Indian law or any law of the Federal or any Provincial Legislature, be excluded from practising medicine, surgery or midwifery in British India, or in any part thereof, or from being registered as qualified so to do, on any ground other than the ground that the diploma held by him does not furnish a sufficient guarantee of his possession of the requisite knowledge and skill for the practice of medicine, surgery and midwifery and he shall not be so excluded on that ground unless a law of the Federation

Medical qualifications

or of the Province, as the case may be, makes provision for securing—

(*a*) that no proposal for excluding the holders of any particular diploma from practice or registration shall become operative until the expiration of twelve months after notice thereof has been given to the Governor-General and to the University or other body granting that diploma ; and

(*b*) that such a proposal shall not become operative or, as the case may be, shall cease to operate, if the Privy Council on an application made to them under the next succeeding subsection determine that the diploma in question ought to be recognized as furnishing such a sufficient guarantee as aforesaid.

(2) If any University or other body in the United Kingdom which grants a medical diploma, or any British subject who holds such a diploma, is aggrieved by the proposal to exclude holders of that diploma from practice or registration in British India, that body or person may make an application to the Privy Council, and the Privy Council, after giving to such authorities and persons both in British India and in the United Kingdom as they think fit an opportunity of tendering evidence or submitting representations in writing, shall determine whether the diploma in question does or does not furnish a sufficient guarantee of the possession of the requisite knowledge and skill for the practice of medicine, surgery and midwifery, and shall notify their determination to the Governor-General, who shall communicate it to such authorities, and cause it to be published in such manner, as he thinks fit.

(3) The condition referred to in subsection (1) of this section is that British subjects domiciled in India who hold a medical diploma granted after examination in British India shall not be excluded from practising medicine, surgery or midwifery in the United Kingdom or from being registered therein as qualified medical practitioners, except on the ground that that diploma does not furnish a sufficient guarantee of the possession of the requisite knowledge and skill for the practice of medicine, surgery and midwifery, and shall only be excluded on that ground so long as the law of the United Kingdom makes provision for enabling any question as to the sufficiency of that diploma to be referred to and decided by the Privy Council.

(4) A medical practitioner entitled to practise or to be registered in British India by virtue of a diploma granted in the United Kingdom, or in the United Kingdom by virtue of a diploma granted in British India, shall not in the practice of his profession be subjected to any liability, disability, restriction or condition to which persons entitled to practise by virtue of diplomas granted in the other country are not subject.

(5) The foregoing provisions of this section shall, subject to the modifications hereinafter mentioned, apply in relation to British subjects domiciled in Burma who, by virtue of medical diplomas granted to them in Burma or the United Kingdom, are, or are entitled to be, registered in the United Kingdom as qualified medical practitioners as they apply in relation to British subjects domiciled in the United Kingdom who, by virtue of medical diplomas granted in the United Kingdom, are, or are entitled to be, registered in the United Kingdom as qualified medical practitioners.

The said modifications are as follows, that is to say,—

(*a*) subsection (3) shall not apply and the reference in subsection (1) to the condition set out therein shall be deemed to be omitted;

(*b*) any reference in subsection (2) or subsection (4) to the United Kingdom shall be construed as a reference to Burma.

(6) Nothing in this section shall be construed as affecting any power of any recognized authority in the United Kingdom or British India to suspend or debar any person from practice on the ground of misconduct, or to remove any person from a register on that ground.

(7) In this section the expression 'diploma' includes any certificate, degree, fellowship, or other document or status granted to persons passing examinations.

See Introduction to this Chapter.

121. A person who holds a commission from His Majesty as a medical officer in the Indian Medical Service or any other branch of His Majesty's forces and is on the active list shall by virtue of that commission be deemed to be qualified to practise medicine, surgery and midwifery in British India, and be entitled to be registered in British India or any part thereof as so qualified. Officers of Indian Medical Service, etc.

This section applies to the members of the Indian Medical Service, of the Royal Army Medical Corps, and of the Royal Air Force.

PART VI

ADMINISTRATIVE RELATIONS

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PART VI

ADMINISTRATIVE RELATIONS BETWEEN FEDERATION, PROVINCES AND STATES

INTRODUCTION

The Act provides for a complete readjustment of the relations between the Federal and Provincial Governments having regard to the transformation of British India from a unitary into a federal state brought about by this Act. Under the old constitution, the Provincial Governments were directly subordinate to the central Government, and under a statutory obligation to obey its orders. But under the present constitution, the respective spheres of the Federation and the Provinces are strictly delimited and the jurisdiction of each (except in the concurrent field) excludes the jurisdiction of the other, and provisions have therefore been made in this part for the establishment of a new nexus between the Federation and its constituent units.

The Federal Legislature has power to enact legislation in federal subjects which will have the force of law in every Province and, subject to such reservation as may be contained in the Ruler's Instrument of Accession, in every Federated State. The administration and the execution of these laws are to be vested in the Federation itself and its officers. The Governor-General may, however, with the consent of the Provincial Government or the Ruler of a Federated State, entrust either conditionally or unconditionally to that Government or Ruler the administration and execution of functions in relation to any matter to which the executive authority of the Federation extends. The Federal Legislature may also delegate to the Governments of the units or to the Federated States the duty of executing and administering the law on behalf of the Federal Government. It will be the duty of a Provincial Government so to exercise its executive power and authority, in so far as it is necessary and applicable for the purpose, as to secure that due effect is given within the Province to every act of the Federal Legislature which applies to that Province. The Federal Government has also been empowered to give directions to a Provincial Government for the purpose of securing that due effect is given in the Province to any such Act, and that the manner in which the Provincial Government's executive power and authority are exercised in relation to the administration of the law is in harmony with the policy of the Federal Government.

Provisions have also been made for the execution of agreements between the Governor-General and the Ruler of a Federated State for the exercise by the Ruler of functions in relation to the administration in his State of any law of the Federal Legislature which applies to it. Such agreements are to contain terms enabling the Governor-General to satisfy himself, by inspection or otherwise, that the administration of the law to which the agreement relates is carried out in accordance with the policy of the Federal Government, and if he is not satisfied with such administration, he may issue directions to the Ruler. The general instructions to the Government of a State for the purpose of ensuring that the federal obligations of the State are duly fulfilled shall come directly from the Governor-General himself. In issuing directions to the constituent

units in respect of the observance of federal laws or the performance of duties thereunder, the Governor-General will always act in his discretion. If, however, any question arises as to whether the executive authority of the Federation is exercisable in a State with respect to any matter or as to the extent to which it is so exercisable, the question is to be referred to the Federal Court in its original jurisdiction.[1]

But the Act draws a distinction between the execution of federal Acts with respect to subjects on which the Federal Legislature is alone competent to legislate (List I)[2] and the execution of federal Acts in the concurrent field (List III).[3] It is open to the Federal Government to give directions to a Provincial Government which is so carrying on the administration of a provincial subject as to affect prejudicially the efficiency of an exclusively federal subject. But the objects of legislation in the concurrent field (Part II of List III) are predominantly matters of provincial concern, and the agency by which such legislation will be administered will be almost exclusively a provincial agency. The Federal Legislature will be generally used as an instrument of legislation in this field from considerations of practical convenience, but this procedure does not carry with it automatically an extension of the scope of federal administration. This class of concurrent subjects consists mainly of the regulation of mines, factories, employers' liability and workmen's compensation, trade unions, welfare of labour, industrial disputes, infectious diseases, electricity and cinematograph films. In respect of these matters, the Federal Government shall have the power to issue directions for the enforcement of the law but only to the extent provided by the federal Act in question. In order that the Federal Legislature may not sanction any unreasonable encroachment upon the provincial field of action, the Act as a safeguard against such encroachment provides that the insertion of any clause in the federal statute which will confer such powers on the Federal Government must require the previous sanction of the Governor-General in his discretion.

The Act also provides for a situation in which Provincial Government has declined to carry out the directions it has received from the Federal Government. It may arise when the Federal Ministry and the Provincial Ministry arrive at a contrary decision in respect of the same subject. Where a conflict of this kind arises between the Federal Government and the Government of a Province, any directions by the Governor-General which require the Governor to dissent from, or to overrule, the Provincial Ministry are to be given in the Governor-General's discretion. Among the special responsiblities of the Governor of a Province is one for ' securing the execution of orders lawfully issued by the Governor-General ', and the directions of the Governor-General would in reality be his orders. So it will be the duty of Governor to secure their execution even in opposition to the policy, and (it must necessarily follow) to the advice, of his ministers.

Lastly, the Governor-General has been empowered, having regard to his ultimate responsibility for peace for whole of India, to issue instructions in his discretion to the Governor of a Province as to the manner in which the executive power and authority in the Province are to be exercised for the purpose of preventing any grave menace to the peace and tranquillity of India or any part thereof. This may be considered superfluous in view of the special responsibility of the Governor for the prevention of any grave menace to the peace and tranquillity of his own

1 See s. 128(2) Prov. 2 See s. 124(2). 3 See s. 126.

Province and of his special responsibility for securing the execution of orders lawfully issued by the Governor-General even within the sphere of Governor's statutory functions; as, under the provisions of s. 54, the Governor of a Province is under a statutory obligation of complying with the directions of the Governor-General, in those cases where the Governor is required under the Act to act in his discretion or in exercise of his individual judgement. But that the powers are not altogether superfluous will be evident from the illustration referred to in par. 222 of the Report of the Joint Select Committee. A conspiracy in one Province to disturb the peace and tranquillity of another might well be outside the Governor's special responsibility for the prevention of any grave menace to the peace or tranquillity of the former Province; and since, an ultimate and residuary responsibility for the peace and tranquillity of the whole of India must vest in the Governor-General, it is plain that the latter's power to give directions to a Governor should be wide enough to cover this case, and that it should be obligatory on a Governor to give effect to those directions, even though it is the peace of a neighbouring Province, and not his own, which is endangered.

The Act provides for a constitutional machinery for disposing of disputes and differences between one Province and another, other than disputes involving legal issues. Although the Act does not itself create it, it provides that at some future date, if it is considered necessary, an Inter-provincial Council may be constituted by His Majesty in Council on representation from the Governor-General. The duties of the Council will be threefold. It will enquire into, and advise upon, disputes (other than those involving legal issues, for the determination of which the Federal Court is the proper forum) between one Province and another. In this respect, its function will be strictly advisory. It will also be the duty of the Council to discuss and adjust administrative problems common to adjacent areas, as well as points of difference. Lastly, it will assist the Provinces to co-ordinate their policy in respect of a number of subjects. It is obvious, as the Joint Select Committee observe in par. 223 of their Report, that if departments or institutions of co-ordination and research are to be maintained at the centre in such matters as agriculture, forestry, irrigation, education and public health, and if such institutions are to be able to rely on appropriations of public funds sufficient to enable them to carry on their work, the joint interest of the Provincial Governments in them must be expressed in some regular and recognized machinery of inter-governmental consultation.[1]

It shall be lawful for His Majesty in Council to establish such a Council and to define the nature of the duties to be performed by it and its organization and procedure. An order establishing such Council may make provision for representatives of Indian States to participate in the work of the Council.

Water supplies

The Act confers on the Provinces exclusive legislative power in relation to 'Water, i.e. to say water supplies, irrigation canals, drainage and embankments, water storage and water power',[2] and reserves no powers of any kind to the Federal Government or Legislature. The effect of this is to give each Province complete powers over water supplies within the Province without any regard whatever to the interests of neighbouring Provinces. The Act excludes the jurisdiction of the Federal Court to decide any dispute

[1] See par. 223.
[2] See item 19 of List II, Seventh Schedule.

between two Provinces in connexion with water supplies, if legal rights or interests are concerned, as the rules of law based upon the analogy of private proprietory interests in water do not afford a satisfactory basis for settling disputes in Provinces or States where the interests of the public at large in the proper use of water supplies are involved. It is therefore provided that where a dispute arises between two units of the Federation with respect to an alleged use by one unit of its executive or legislative powers in relation to water supplies in a manner detrimental to the interests of the other, the aggrieved unit should be entitled to appeal to the Governor-General acting in his discretion, and that the Governor-General has been empowered to adjudicate on the matter. But the Governor-General, unless he thinks fit summarily to reject the complaint, is required to appoint a Commission for the purpose of investigating and reporting upon it. The Commission would be appointed *ad hoc*, and would be an expert body whose functions would be to furnish the Governor-General with such technical information as he might require for the purposes of his decision and to make recommendations to him. The jurisdiction of the Federal Court has only been excluded in the case of any dispute which could be referred to the Governor-General in the above manner. The powers of the Governor-General do not extend to a case where one unit is desirous of securing the right to make use of water supplies in the territory of another unit, but only to the case of one unit using water to the detriment of another.

If the Government of a Province or the Ruler of a State is aggrieved by the decision of the Governor-General, the Provincial Governor or the Ruler may request the Governor-General to refer the matter to His Majesty in Council. Any Act of a Provincial Legislature or of a State which is repugnant to order of the Governor-General (or of His Majesty in Council on appeal) in respect of water supplies will be void to the extent of the repugnancy.

The machinery of the Water Tribunal and the Governor-General's power of giving directions in this field will under the Act operate in regard to a Federated State. But this would not subject a Federated State to a federal authority (in this case the Governor-General in his discretion) otherwise than by virtue of the acceptance of this particular item in the Legislative List. But provision has been made [1] whereby a State could on accession agree or refuse to come within the scope of ss. 130–133 (inclusive). A Federated State which did not accept these provisions, would, of course, be in the same position as an unfederated State in the case of disputes arising regarding water supplies.

General

Obligation of units and Federation

122.—(1) The executive authority of every Province and Federated State shall be so exercised as to secure respect for the laws of the Federal Legislature which apply in that Province or State.

(2) The reference in sub-section (1) of this section to laws of the Federal Legislature shall, in relation to any Province, include a reference to any existing Indian law applying in that Province.

[1] See s. 134.

(3) Without prejudice to any of the other provisions of this Part of this Act, in the exercise of the executive authority of the Federation in any Province or Federated State regard shall be had to the interests of that Province or State.

See Introduction to this Chapter. *Existing Indian law* is defined in s. 311(1). S. 292 provides for the continuance of existing laws in force at the commencement of Part III of the Act, subject to amendments by competent authority. S. 317 provides for the continuance of certain provisions of the old Act with certain amendments as set out in the Ninth Schedule.

Governor-General may require Governors to discharge certain functions as his agents

123.—(1) The Governor-General may direct the Governor of any Province to discharge as his agent, either generally or in any particular case, such functions in and in relation to the tribal areas as may be specified in the direction.

(2) If in any particular case it appears to the Governor-General necessary or convenient so to do, he may direct the Governor of any Province to discharge as his agent such functions in relation to defence, external affairs, or ecclesiastical affairs as may be specified in the direction.

(3) In the discharge of any such functions the Governor shall act in his discretion.

See Introduction to this Chapter. The Governor, under s. 52(1) (*g*) has special responsibility for securing the execution of orders given to him under Part VI by the Governor-General.

Power of Federation to confer powers, etc. on Provinces and States in certain cases

124.—(1) Notwithstanding anything in this Act, the Governor-General may, with the consent of the Government of a Province or the Ruler of a Federated State, entrust either conditionally or unconditionally to that Government or Ruler, or to their respective officers, functions in relation to any matter to which the executive authority of the Federation extends.

(2) An Act of the Federal Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer powers and impose duties upon a Province or officers and authorities thereof.

(3) An Act of the Federal Legislature which extends to a Federated State may confer powers and impose duties upon the State or officers and authorities thereof to be designated for the purpose by the Ruler.

(4) Where by virtue of this section powers and duties have been conferred or imposed upon a Province or Federated State or officers or authorities thereof, there shall be paid by

the Federation to the Province or State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the Province or State in connection with the exercise of those powers and duties.

See Introduction to this Chapter. The extra cost of administration incurred by the Province or State for exercising the powers and duties entrusted by the Governor-General is to be paid by the Federation.
See s. 200 for the Chief Justice of India.

Administration of Federal Acts in Indian States

125.—(1) Notwithstanding anything in this Act, agreements may, and, if provision has been made in that behalf by the Instrument of Accession of the State, shall, be made between the Governor-General and the Ruler of a Federated State for the exercise by the Ruler or his officers of functions in relation to the administration in his State of any law of the Federal Legislature which applies therein.

(2) An agreement made under this section shall contain provisions enabling the Governor-General in his discretion to satisfy himself, by inspection or otherwise, that the administration of the law to which the agreement relates is carried out in accordance with the policy of the Federal Government and, if he is not so satisfied, the Governor-General, acting in his discretion, may issue such directions to the Ruler as he thinks fit.

(3) All courts shall take judicial notice of any agreement made under this section.

See Introduction to this Chapter. Disputes arising out of the agreement may be referred to the Federal Court in its original jurisdiction See s. 204, Prov. (*a*) (ii).

Control of Federation over Province in certain cases

126.—(1) The executive authority of every Province shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation, and the executive authority of the Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for that purpose.

(2) The executive authority of the Federation shall also extend to the giving of directions to a Province as to the carrying into execution therein of any Act of the Federal Legislature which relates to a matter specified in Part II of the Concurrent Legislative List and authorises the giving of such directions :

Provided that a Bill or amendment which proposes to authorise the giving of any such directions as aforesaid shall not be introduced into or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) The executive authority of the Federation shall also extend to the giving of directions to a Province as to the construction and maintenance of means of communication declared in the direction to be of military importance:

Provided that nothing in this subsection shall be taken as restricting the power of the Federation to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(4) If it appears to the Governor-General that in any Province effect has not been given to any directions under this section, the Governor-General, acting in his discretion, may issue as orders to the Governor of that Province either the directions previously given or those directions modified in such manner as the Governor-General thinks proper.

(5) Without prejudice to his powers under the last preceding subsection, the Governor-General, acting in his discretion, may at any time issue orders to the Governor of a Province as to the manner in which the executive authority thereof is to be exercised for the purpose of preventing any grave menace to the peace or tranquillity of India or of any part thereof.

Cl. (1) and (4): See Introduction to this Chapter and J.C.R. 221.
Cl. (2): See Introduction to this Chapter, par. 4 and J.C.R. 219-20.
Cl. (5): See Introduction to this Chapter, par. 6 and J.C.R. 222.
The Governor-General has a special responsibility for prevention of any grave menace to the peace or tranquillity of India or any part thereof. See s. 12(1) (*a*).

127. The Federation may, if it deems it necessary to acquire any land situate in a Province for any purpose connected with a matter with respect to which the Federal Legislature has power to make laws, require the Province to acquire the land on behalf, and at the expense, of the Federation or, if the land belongs to the Province, to transfer it to the Federation on such terms as may be agreed or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India. Acquisition of land for Federal purposes

See s. 200 for the Chief Justice of India.

Duty of Ruler of a State as respects Federal subjects

128.—(1) The executive authority of every Federated State shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation so far as it is exercisable in the State by virtue of a law of the Federal Legislature which applies therein.

(2) If it appears to the Governor-General that the Ruler of any Federated State has in any way failed to fulfil his obligations under the preceding subsection, the Governor-General, acting in his discretion, may after considering any representations made to him by the Ruler issue such directions to the Ruler as he thinks fit:

Provided that, if any question arises under this section as to whether the executive authority of the Federation is exercisable in a State with respect to any matter or as to the extent to which it is so exercisable, the question may, at the instance either of the Federation or the Ruler, be referred to the Federal Court for determination by that Court in the exercise of its original jurisdiction under this Act.

See Introduction to this Chapter, par. 3. See s. 204 for the original jurisdiction of the Federal Court.

Broadcasting

Broadcasting

129.—(1) The Federal Government shall not unreasonably refuse to entrust to the Government of any Province or the Ruler of any Federated State such functions with respect to broadcasting as may be necessary to enable that Government or Ruler—

(*a*) to construct and use transmitters in the Province or State;

(*b*) to regulate, and impose fees in respect of, the construction and use of transmitters and the use of receiving apparatus in the Province or State:

Provided that nothing in this subsection shall be construed as requiring the Federal Government to entrust to any such Government or Ruler any control over the use of transmitters constructed or maintained by the Federal Government or by persons authorised by the Federal Government, or over the use of receiving apparatus by persons so authorised.

(2) Any functions so entrusted to a Government or Ruler shall be exercised subject to such conditions as may be imposed by the Federal Government, including, not-

withstanding anything in this Act, any conditions with respect to finance, but it shall not be lawful for the Federal Government so to impose any conditions regulating the matter broadcast by, or by authority of, the Government or Ruler.

(3) Any Federal laws which may be passed with respect to broadcasting shall be such as to secure that effect can be given to the foregoing provisions of this section.

(4) If any question arises under this section whether any conditions imposed on any such Government or Ruler are lawfully imposed, or whether any refusal by the Federal Government to entrust functions is unreasonable, the question shall be determined by the Governor-General in his discretion.

(5) Nothing in this section shall be construed as restricting the powers conferred on the Governor-General by this Act for the prevention of any grave menace to the peace or tranquillity of India or any part thereof, or as prohibiting the imposition on Governments or Rulers of such conditions regulating matter broadcast as appear to be necessary to enable the Governor-General to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment.

As in Canada, the Act provides for federal control for Broadcasting subject to certain reservations.[1] But the Federation may not unreasonably refuse a Province or a State permission to construct or use transmitters or impose fees for their use or the use of receiving apparatus, but no power may be conceded to regulate use of apparatus provided by the Federation. Functions including terms of finance, may be conferred subject to conditions and a Provincial or a State Government may be subject to conditions in respect of the matter in so far as they appear necessary to the Governor-General to discharge functions in his discretion or in his individual judgement or in respect of the peace and tranquillity of India. Any dispute as to the grant of functions or condition will be decided by the Governor-General in his discretion and not by the Federal Court.

Interference with Water Supplies

130. If it appears to the Government of any Governor's Province or to the Ruler of any Federated State that the interests of that Province or State, or of any of the inhabitants thereof, in the water from any natural source of supply in any Governor's or Chief Commissioner's

Complaints as to interference with water supplies

[1] See *In re Regulation and Control Radio Communication in Canada* (1932) A.C. 304.

Province or Federated State, have been, or are likely to be, affected prejudicially by—

(*a*) any executive action or legislation taken or passed, or proposed to be taken or passed; or

(*b*) the failure of any authority to exercise any of their powers,

with respect to the use, distribution or control of water from that source, the Government or Ruler may complain to the Governor-General.

See Introduction to this Chapter. The provisions as to interference with water supplies will be in force during the transition period from the commencement of Part III of the Act and the inauguration of the Federation.

Decision of complaints

131.—(1) If the Governor-General receives such a complaint as aforesaid, he shall, unless he is of opinion that the issues involved are not of sufficient importance to warrant such action, appoint a Commission consisting of such persons having special knowledge and experience in irrigation, engineering, administration, finance or law, as he thinks fit, and request that Commission to investigate in accordance with such instructions as he may give to them, and to report to him on, the matters to which the complaint relates, or such of those matters as he may refer to them.

(2) A Commission so appointed shall investigate the matters referred to them and present to the Governor-General a report setting out the facts as found by them and making such recommendations as they think proper.

(3) If it appears to the Governor-General upon consideration of the Commission's report that anything therein contained requires explanation, or that he needs guidance upon any point not originally referred by him to the Commission, he may again refer the matter to the Commission for further investigation and a further report.

(4) For the purpose of assisting a Commission appointed under this section in investigating any matters referred to them, the Federal Court, if requested by the Commission so to do, shall make such orders and issue such letters of request for the purposes of the proceedings of the Commission as they may make or issue in the exercise of the jurisdiction of the court.

(5) After considering any report made to him by the Commission, the Governor-General shall give such decision

and make such order, if any, in the matter of the complaint as he may deem proper:

Provided that if, before the Governor-General has given any decision, the Government of any Province or the Ruler of any State affected request him so to do, he shall refer the matter to His Majesty in Council and His Majesty in Council may give such decision and make such order, if any, in the matter as he deems proper.

(6) Effect shall be given in any Province or State affected to any order made under this section by His Majesty in Council or the Governor-General, and any Act of a Provincial Legislature or of a State which is repugnant to the order shall, to the extent of the repugnancy, be void.

(7) Subject as hereinafter provided the Governor-General, on application made to him by the Government of any Province, or the Ruler of any State affected, may at any time, if after a reference to, and report from, a Commission appointed as aforesaid he considers it proper so to do, vary any decision or order given or made under this section:

Provided that, where the application relates to a decision or order of His Majesty in Council and in any other case if the Government of any Province or the Ruler of any State affected request him so to do, the Governor-General shall refer the matter to His Majesty in Council, and His Majesty in Council may, if he considers proper so to do, vary the decision or order.

(8) An order made by His Majesty in Council or the Governor-General under this section may contain directions as to the Government or persons by whom the expenses of the Commission and any costs incurred by any Province, State or persons in appearing before the Commission are to be paid, and may fix the amount of any expenses or costs to be so paid, and so far as it relates to expenses or costs, may be enforced as if it were an order made by the Federal Court.

(9) The functions of the Governor-General under this section shall be exercised by him in his discretion.

See Introduction to this Chapter under WATER SUPPLIES. If any party to the dispute is not satisfied with the order of the Governor-General made on the report of the Commission, he may require the Governor-General to refer the matter to His Majesty in Council. The final authority—the Governor-General or His Majesty in Council (when there is a reference made to him), will give directions as to the costs incurred, by the parties in connexion with the Commission and such

directions will be enforced like an order of the Federal Court. See s. 209(2).

Interference with water supplies of Chief Commissioner's Province

132. If it appears to the Governor-General that the interests of any Chief Commissioner's Province, or of any of the inhabitants of such a Province, in the water from any natural source of supply in any Governor's Province or Federated State have been or are likely to be affected prejudicially by—

(*a*) any executive action or legislation taken or passed, or proposed to be taken or passed, or

(*b*) the failure of any authority to exercise any of their powers,

with respect to the use, distribution or control of water from that source, he may, if he in his discretion thinks fit, refer the matter to a Commission appointed in accordance with the provisions of the last preceding section and thereupon those provisions shall apply as if the Chief Commissioner's Province were a Governor's Province and as if a complaint with respect to the matter had been made by the Government of that Province to the Governor-General.

Jurisdiction of Courts excluded

133. Notwithstanding anything in this Act, neither the Federal Court nor any other court shall have jurisdiction to entertain any action or suit in respect of any matter if action in respect of that matter might have been taken under any of the three last preceding sections by the Government of a Province, the Ruler of a State, or the Governor-General.

The Federal Court will have jurisdiction to decide any dispute between the two units in connexion with water supplies, if legal rights or interests are concerned. See Introduction to this Chapter under WATER SUPPLIES.

Ruler of State may exclude application of provisions as to water supply

134. The provisions contained in this Part of this Act with respect to interference with water supplies shall not apply in relation to any Federated State the Ruler whereof has declared in his Instrument of Accession that those provisions are not to apply in relation to his State.

Ss. 130–33 regarding water supplies will not apply to a Federated State, in the Instrument of Accession of which these provisions have been excluded.

Inter-provincial Co-operation

135. If at any time it appears to His Majesty upon consideration of representations addressed to him by the Governor-General that the public interests would be served by the establishment of an Inter-Provincial Council charged with the duty of— Provisions with respect to an Inter-Provincial Council

(*a*) inquiring into and advising upon disputes which may have arisen between Provinces;

(*b*) investigating and discussing subjects in which some or all of the Provinces, or the Federation and one or more of the Provinces, have a common interest; or

(*c*) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for His Majesty in Council to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

An Order establishing any such Council may make provision for representatives of Indian States to participate in the work of the Council.

See Introduction to this Chapter. This section will be in force during the transition period.

PART VII

FINANCE, PROPERTY, CONTRACTS AND SUITS

CHAPTER I

FINANCE

DISTRIBUTION OF REVENUES BETWEEN THE FEDERATION AND THE FEDERAL UNITS

This part provides for the allocation of the sources of revenues between the Federation and the units. Provisions have also been made for the additional expenditure that is to be incurred by reason of the constitutional changes made by the Act. The distribution of taxing authority between the Federal and the Provincial Governments raises a complex problem, for the Government of the Federation and the Government of the unit, each with independent powers, are collecting money from the same body of tax-payers. As the authors of the Joint Parliamentary Committee observe in paragraph 244 of their Report:

> The constitutional problem is simplified if it is possible to allocate separate fields of taxation to the two authorities, but the revenues derived from such a division, even where it is practicable, may not fit the economic and financial requirements of each party; neither do these requirements necessarily continue to bear constant relation to each other and yet it is difficult to devise a variable allocation of resources. So far as we are aware, no entirely satisfactory solution of this problem has yet been found in any federal system.

The separation of the resources of the Government of India and the Provincial Governments under the old Act was merely an act of statutory devolution which could be varied by the Government of India and Parliament at any time. Nevertheless, from a practical financial point of view, there was in existence a federal system of finance. The authors of the old constitution adopted almost completely a rigid separation of the sources of revenue assigned respectively to the Centre and to the Provinces. This system had certain serious defects, the three chief ones being the following:

(*a*) For the Provinces' rapidly expanding needs, the sources of provincial revenue (of which the chief are land revenue, alcoholic excise and stamps) are insufficient and show no signs of adequate growth, whereas the central sources of revenue (of which the chief are customs, non-alcoholic excise, income-tax and salt) which have to meet comparatively stationary needs, are expanding or capable of expansion.

(*b*) It has treated the Provinces unequally by giving some of them a much greater proportionate increase of revenue than others.

(*c*) It has given practically no power to the Provinces to tax industrial activities and has, therefore, handicapped the industrial Provinces as contrasted with the agricultural ones.[1]

[1] See the Report of the Sim. C. R., Vol. II, par. 246, p. 214.

'From the point of view of expenditure', as the Joint Parliamentary Committee[1] referring to the financial scheme as adopted in the old Act, observe, 'the essentials of the position are (and no change in this respect is to be expected) that the Provinces have an almost inexhaustible field for the development of social services, while the demands upon the centre, except in time of war or acute frontier trouble, are constant in character ..... But the resources of the centre comprise those which should prove most capable of expansion in a period of normal progress.' The consequence of the acceptance of the old financial scheme (commonly called the Meston Award) has been according to the Joint Parliamentary Committee :

(*a*) that there are a few Provinces where the available sources of revenue are never likely to be sufficient to meet any reasonable standard of expenditure ; and

(*b*) that the existing division of heads of revenue between the centre and the Provinces leaves the centre with an undue share of those heads which respond most readily to an improvement in economic conditions.

Income-tax

The above considerations led to a very strong claim by the Provinces for a substantial share of the income-tax, specially in the Provinces of Bengal and Bombay. As the Joint Select Committee observe,[2] the provincial claim to income-tax received an added impetus by the attitude of the States in the matter of direct taxation. The States hitherto were pressing more and more for the allocation to them of a share in the proceeds of the sea custom duties. But with their entry into the Federation, the States will take part in the determination of the Indian tariff and thus their claim to a separate share in the proceeds disappears. But a new difficulty arose. If the Federation were to retain the whole of the income-tax as the centre did under the old law, it would be natural to require the subjects of the Federated States to pay income-tax towards the benefit of the federal fisc, But the States were not prepared to agree to this. So the most difficult question arising in the problem of allocation, was that of the treatment of the income-tax.

After discussion in the Round Table Conference, a sub-committee of the Federal Structures Committee (known as the Peel Committee) was appointed to examine the question of federal finance, and the principles embodied in the Report of the Peel Committee were adopted by the Federal Structure Committee. The Peel Committee, *inter alia*, recommended : (1) that the income-tax should be transferred to the Provinces, with the exception of corporation tax which might under certain circumstances be retained by the Federal Government ; (2) that the whole of the income-tax to be transferred to the Provinces should be so transferred at the outset of the Federation and that any resultant federal deficit should be met by provincial contributions ; and (3) that the Constitution should specifically provide for the extinction of the provincial contribution by annual stages over a definite period, such as ten or fifteen years. The Federal Finance Committee presided over by Lord Percy (known as the Percy Committee) appointed in December 1931 to examine, *inter alia*, the question of income-tax, found that there would be a very substantial deficit in the federal finance if the whole proceeds of the income-tax (excluding corporation tax) were transferred

[1] Report, par. 245.

[2] Report, pars. 247 and 248.

to the Provinces and also that on the data available, it was impossible to specify an annual rate of reduction of provincial contribution or a definite period within which it could be anticipated with reasonable certainty that the natural growth of existing federal revenues would enable the Federal Government to extinguish contributions altogether. This conclusion and the objections felt to the reintroduction of provincial contributions (having regard to the experience under the Meston settlement) led His Majesty's Government to abandon the scheme outlined by the Peel Committee. The Joint Parliamentary Committee[1] dealt with the difficult question of the amount of the share to be allocated to the Provinces of the proceeds of taxes on income, and the share to be retained by the Federation. They were of opinion that it would be wiser to base the division upon the financial and economic needs of the Federation and the units. The difficulty was that the Federation was unlikely, at least for some years to come, to be able to spare much, if anything, by way of fresh resources for the Provinces, apart from the pressing needs of the deficit Provinces. But the Provinces, it was felt, should have some indication of the share of the income-tax which they may ultimately expect. The White Paper Proposals[2] were that the taxes on income derived from federal sources, i.e., federal areas or emoluments of federal officers, will be permanently assigned to the Federation. Of the yield of the rest of the normal taxes on income (except corporation tax), a specified percentage (to be fixed by Order in Council at the last possible moment) should be assigned to the Provinces; this specified percentage was to be not less than 50, nor more than 75 per cent. Out of the sum so assigned to the Provinces, the Federal Government would be entitled to retain an amount fixed for three years, which would be reduced gradually to zero over a period of seven years, the Governor-General having the power to suspend these reductions if necessary. It was also proposed in the White Paper that the Federal Government and Legislature were to have the power to impose a surcharge on income-tax solely for federal purposes. The Joint Parliamentary Committee agreed that the percentage to be allotted to the Provinces should be fixed as late as possible by Order in Council, but they saw no possibility of fixing a higher percentage than 50 per cent., and they did not think it possible to prescribe in advance a time-table for the process of gradual diminution of the amount retained by the Federation; the Committee were of opinion that for some time to come, the centre was unlikely to be able to do much more than find funds necessary for the deficit Provinces, and that an early distribution of any substantial part of the income-tax was improbable. The Committee further thought that it would be preferable to leave the actual period of the gradual diminution of the amount retained by the Federation to be determined by Order in Council according to circumstances (the Governor-General's power to suspend being retained).

In s. 138, these suggestions have been embodied. The amount is to be distributed among the Provinces in the prescribed manner. The percentage originally prescribed for any Province is not to be increased subsequently but is to remain fixed for all time, even though the needs of the Federation for revenue to finance the deficit Provinces may become less in future. Out of the percentage so prescribed, the Federation may retain a certain amount for a fixed number of years (prescribed under Cl. 2(*a*) by Order in Council) and thereafter, a gradually diminishing

1 Report, par. 249.

2 Pars. 139 and 141.

amount for a number of years as prescribed under Cl. 2(*b*), the amount of diminution each year to be equal to the amount of contribution at the last of such prescribed years, so that the year after, the diminution will be zero. An illustration will make this clear. Suppose the amount retained by the Federation from the contribution for income-tax from the Province is 5 lakhs, and that under Cl. 2(*a*) of the section, three years are prescribed (from 1937 to 1940) during which there shall be no diminution, and that under Cl. 2(*b*), nine years is further prescribed for the gradual diminution of the amount so retained. The annual diminution will be Rs.50,000 less than the previous year's figure. So the amount retained after the first three years will be—1941 : Rs.4,50,00; 1942 : Rs.4,00,000 ; 1943 : Rs.3,50,000 ; 1944 : Rs.3,00,000 ; 1945 : Rs. 2,50,000 ; 1946 : Rs.2,00,000 : 1947 : Rs.1,50,000 ; 1948 : Rs.1,00,000 and 1949 : Rs.50,000 (that is nine years after the expiry of the prescribed period under Cl. 2(*a*)). So in the tenth year, 1950, the amount retained by the Federation will be zero. The Governor-General may direct that during any one of these nine years, the diminution shall not take place, e.g., he may direct that for 1945, the diminution shall not take place so that the Federation retains Rs.2,50,000. In that case, the period is extended to ten years. Thus though the benefits to be given to any Province as share of the income-tax cannot be increased (by increase in the prescribed percentage or by curtailing the period of retention or the period of gradual diminution), yet (1) they may be diminished by the diminution of the prescribed percentage by subsequent Order in Council—all that Cl. (1) Prov. (*a*) says is that the prescribed percentage may not be *increased* by subsequent Order in Council ; (2) the period prescribed under Cl. 2(*a*) for the retention in full without diminution by the Federation of a prescribed portion of the amount assigned to the Provinces cannot be reduced by any subsequent Order in Council ; (3) nor can the period after which the retention by the Federation may be zero, be reduced. In other words, once the prescribed percentage of the net proceeds of income-tax has been fixed as the share of any Province, the amount cannot be subsequently increased. Once the period of retention without diminution has been fixed, it cannot be reduced, nor can the total period for which the retention by the Federation of a part of the provincial share is to continue (in a diminishing scale). So even if the needs of the Federation become less—in case, for instance, the grants to the deficit Provinces are reduced—no relief to the Province can be given, once the three Orders in Council under Cl. (1), Prov. (*a*), Cl. (2) (*a*) and (*b*) have been made. On the other hand the percentage of contribution to the Provinces may be diminished by subsequent Order in Council, and under Cl. (2), Prov. (ii), the period during which the centre may retain a portion of the provincial share may be increased. The deficit Provinces may ask for more grant, e.g., towards the expenses of a High Court or of a separate university. It will be open to the Federation to make increased grants which might necessitate a longer period of retention by the Federation from the provincial share of income-tax.

Effect of the Orders in Council

As to the effect and scope of these Orders in Council, the Secretary of State in his evidence before the Joint Parliamentary Committee, stated as follows :

> There seemed to be an idea, in certain quarters of the Committee that what was meant was a continuing control and intervention by the British Parliament through Orders in Council on taxation questions in India. That is in no way the intention of the proposals

in the White Paper. Our intention, put in a single sentence, is that either the Act or the Order in Council immediately after the Act, having made that prescription, that prescription is final. The actual carrying out of the prescription, then, becomes more or less an automatic affair.

The Act recognizes the necessity for securing a considerable degree of elasticity to provincial resources, and provides for a more equitable distribution between the Federation and the Provinces. The Federal Legislature has been empowered to assign to Provinces and States in accordance with such schemes of distribution as it may determine the whole or any part of the net revenues from the following sources:

(1) income-tax—(see s. 138); (2) salt duties, excise duties and export duties (see s. 139); (3) certain succession duties, stamp duties, terminal taxes and taxes on fares and freights (see s. 137). In the case of export duties on jute or jute products, an assignment to the producing units will be compulsory and will amount to at least 50 per cent. of the net revenue from the duty: (see s. 140(2)).

Besides, the Act makes provision for subventions to the deficit Provinces.[1] For financial adjustments between the Federation and the States, see ss. 145–9.

Allocation of revenues

Revenues derived from sources in respect of which the legislature of a Governor's Province has exclusive or concurrent power to make laws have been allocated as provincial revenues, and revenues derived from sources in respect of which the Federal Legislature has exclusive power to make laws have been allocated as federal revenues, (see lists given below). But in the cases specified in the Act, the Federation has been empowered or required to make assignments to Provinces and States from federal revenues. Legislative power in relation to taxation and raising of revenue has been defined in the Legislative Lists of the Seventh Schedule. It will be observed that the Act does not lay down the principles of distribution of the proceeds of revenues except in the case of export duty on jute collected by the Federation on behalf of the Provinces. The Simon Commission did not recommend the assignment of so much of revenues to the Province as are collected within that Province. The assumption that a Province has a natural right to all the revenues collected within it, is in the opinion of the members of the Commission, indefensible. The customs revenue, for instance, which is collected at ports, is actually paid in some measure by people all over India. Likewise, the income-tax profits are collected in the Province where the headquarters of a business is situated, but often do not arise within the Province. The absence of economic unity, and the taxation which arises from the activities of centres, such as Bombay and Calcutta, may properly be regarded as due to the whole economic life of India. For this reason, some of the revenues collected at the great centres of activity should be spent on matters of common interest or redistributed according to the needs of the various Provinces for expenditure locally. Thus, distribution to the Province of origin does not entirely meet the necessities of the case. The Statutory Commission also considered the matter of distribution in proportion to population. It is simple, automatic and to some extent, a test of the needs of the Provinces. But to distribute a large

[1] See s. 142.

part of the revenues of India on this basis would be unfair to the Provinces with a sparse population and would tend to hold back the progress of the more advanced, and by transferring resources from the richer to the poorer Provinces, would divorce responsibility for taxation from responsibility for spending. The financial system of India should, therefore, include a complete scheme of allocation which would provide for the distribution of centrally collected revenues in part according to origin and in part on a population basis. Whatever be the basis of allocation, it should be pre-determined and not easily liable to be altered.[1] The Act provides that the allocation is fixed in some cases by the Federal Legislature and in others by an Order in Council. Obviously, these considerations do not apply to jute and jute products and the Act, therefore, prescribes that not less than one half of the export duty on jute and jute products shall be assigned to the Provinces in which jute is grown in proportion to the respective amounts of jute grown therein.[2]

FEDERAL LEGISLATIVE LIST

(List I of the Seventh Schedule)

Duties of customs, including export duties.

Duties of excise on tobacco and other goods manufactured or produced in India except: (*a*) alcoholic liquors for human consumption; (*b*) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs; (*c*) medicinal and toilet preparations containing alcohol or any substance contained in (*b*).

Corporation tax.

Salt.

Taxes on income other than agricultural income.

Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

Duties in respect of succession to property other than agricultural land.

Stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.

Terminal taxes on goods or passengers carried by railway or air taxes on railway fares and freights.

PROVINCIAL LEGISLATIVE LIST

(Lists I and II of the Seventh Schedule)

Land revenue, including the assessment and collection of revenue.

Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(i) Alcoholic liquors for human consumption.

(ii) Opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs.

(iii) Medicinal and toilet preparations containing alcohol or any substance included in (ii).

[1] See the Sim. C. R. Vol. II, pp. 275-6 and Percy Committee Report 67–70.

[2] See s. 140 (2).

Taxes on agricultural income.
Taxes on lands and buildings, hearths and windows.
Duties in respect of succession to agricultural land.
Taxes on mineral rights subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.
Capitation taxes.
Taxes on professions, trades, callings and employment.
Taxes on animals and boats.
Taxes on the sale of goods and on advertisements.
Cesses on the entry of goods into a local area.
Taxes on luxuries including taxes on entertainments, amusements, betting and gambling.
Stamp duty in respect of documents other than those specified in the provisions of the Federal Legislative List with regard to stamp duty.
Duties on passengers and goods carried on inland and waterways.
Tolls.

Niemeyer Report

The Joint Select Committee recommended (in paragraph 250) that of the yield of the taxes on income (excluding that derived from federal sources), a specified percentage (to be fixed by Order in Council at the last possible moment) was to be assigned to the Provinces. The necessary financial enquiry was entrusted by His Majesty's Government to Sir Otto Niemeyer, who was asked to make recommendations to them on the matters which under ss. 138(1) and (2), 140(2) and 142 of the Act have to be prescribed or determined by His Majesty in Council (subject to the approval of Parliament) and on any ancillary matter arising out of the financial adjustments between the Government of India and the Provincial Governments regarding which His Majesty's Government may desire a report. Sir Otto Niemeyer made his Report dated the 6th April, 1936, and in paragraphs 25–32 of his Report, he dealt with the question of the distribution of residual taxes on income as between the Federation on the one hand, and the Provinces on the other. He estimated on the 1936-7 budget estimate that there would be a residuum of about 12 crores divisible between the centre and the Provinces. He recommended that: (1) the prescribed percentage of the residual income-tax that shall not form part of the federal revenues under s. 138(1) should be 50 per cent.; (2) under s. 138(2) (*a*), the Federation may for the first prescribed period of five years retain a portion of the moneys assigned to the Provinces; (3) the prescribed sum which may be so retained out of the assigned 50 per cent. shall be the whole or such sum as is necessary to bring the proceeds of the 50 per cent. share accruing to the centre, together with any general budget receipts from the railways, up to 13 crores, whichever is less; and (4) under s. 138(2) (*b*), the centre, under the second prescribed period of five years, shall relinquish to the Provinces by equal steps so much of the provincial share as it is retaining in the last year of the first prescribed period of five years, so that within about ten years from the commencement of provincial autonomy, the Provinces may hope to be enjoying their full share of revenue from income-tax.

Then, as regards the manner in which any proceeds of the income available to the Provinces was to be distributed among them, Sir Otto held that substantial justice will be done by fixing the scale of distribution

partly on residence and partly on population, paying to neither a rigid pedantic deference, and that it was essential to base distribution, not on the figures to be ascertained each year, but on fixed percentages. He recommended that under s. 138(1), the distribution of the prescribed share of the residual income-tax assigned to the Provinces should be :— Madras 15; Bombay 20; Bengal 20; United Provinces 15; Punjab 8; Bihar 10; Central Provinces 5; Assam 2; North-West Frontier Province 1; Orissa 2; and Sind 2.

All the above recommendations of the Niemeyer Report have been adopted in the Government of India (Distribution of Revenues) Order, 1936. See notes to ss. 138, 140, and 142.

Meaning of 'revenues of Federation' and 'revenues of Province'

136. Subject to the following provisions of this chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to Provinces and Federated States, and subject to the provisions of this Act with respect to the Federal Railway Authority, the expression 'revenues of the Federation' includes all revenues and public moneys raised or received by the Federation and the expression 'revenues of the Province' includes all revenues and public moneys raised or received by a Province.

See s. 150(2) where it is laid down that the Federation or a Province may make grants for any purpose, notwithstanding that the purpose is not one with respect to which the Federal or the Provincial Legislature as the case may be, may make laws. But the expenditure defrayable out of Indian revenues must be for the purposes of India or some part of India.

The scheme of allocation under the Act is as follows:

I. Revenues derived from sources in respect of which the Provincial Legislature has exclusive or concurrent power to legislate will be allocated as provincial revenues.

II. Revenues from exclusively federal sources will be allocated as federal revenues, e.g. customs and railway receipts.

III. The Federation is to make assignments in whole or in part of the net proceeds, to Provincial Governments and States in the following cases:

(*a*) salt;
(*b*) federal excises i.e. all excise duties except on alcoholic and narcotic drugs;
(*c*) export duties.

At least 50 per cent. of the export duties on jute and jute products have been compulsorily assigned to the producing units.

IV. The net proceeds on territorial taxes and taxes on railway fares and freights, death duties on properties other than agricultural land, and federal stamp duties, are entirely provincial, although the legislation is federal, but the Federation has powers to impose a surcharge for federal purposes.

V. A prescribed percentage of the net proceeds of income-tax will be assigned to the Provinces in accordance with the provisions of the

Act, subject to the right of the Federation to temporary retention of assigned revenues.

VI. Provision has been made in the Act for special subvention to deficit Provinces.

The conditions under which the States will make contributions to the federal revenues are as follows :

(1) The States will not contribute anything by way of direct taxation to the Federation except in the two following instances :

(*a*) Corporation tax (which may be levied after 10 years from the inauguration of the Federation) ;

(*b*) Special surcharges on income-tax in an emergency.

In respect of the corporation tax, the States will be at liberty to make a contribution in lump sum rather than submit to direct taxation.

(2) The States will bear indirect taxation in respect of

(*a*) customs ;

(*b*) salt duty ;

(*c*) currency and rupee coinage profits ;

(*d*) profits on trading companies earned in States and brought to account in British India.

Certain succession duties, Stamp duties, terminal taxes and taxes on fares and freights

137. Duties in respect of succession to property other than agricultural land, such stamp duties as are mentioned in the Federal Legislative List, terminal taxes on goods or passengers carried by railway, or air, and taxes on railway fares and freights, shall be levied and collected by the Federation, but the net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to Chief Commissioners' Provinces, shall not form part of the revenues of the Federation, but shall be assigned to the Provinces and to the Federated States, if any, within which that duty or tax is leviable in that year, and shall be distributed among the Provinces and those States in accordance with such principles of distribution as may be formulated by Act of the Federal Legislature :

Provided that the Federal Legislature may at any time increase any of the said duties or taxes by a surcharge for Federal purposes and the whole proceeds of any such surcharge shall form part of the revenues of the Federation.

See Introduction to this Chapter; W.P. Prop. 138; J.C.R. 261.

The net revenues derived from the sources specified in the section will be collected by the Federation but will be assigned to the Provinces. The Federal Legislature, will, in each case, lay down the basis of distribution among the Provinces but will be empowered to impose and retain a surcharge on such taxes for federal purposes. The principles of distribution to the Provinces or the Federated States are to be fixed by the Federal Legislature.

In these cases, uniformity in the rate of tax and in administration is essential, and so collection of these taxes by the federal machinery is desirable even though no part of the proceeds is retained by the centre. See items 56–8 in List I of the Seventh Schedule.

Agricultural land: See notes to s. 138(1) under AGRICULTURAL INCOME.

The method of calculation of the ' net proceeds ' is specified in s. 144.

Taxes on income

138.—(1) Taxes on income other than agricultural income shall be levied and collected by the Federation, but a prescribed percentage of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Chief Commissioners' Provinces or to taxes payable in respect of Federal emoluments, shall not form part of the revenues of the Federation, but shall be assigned to the Provinces and to the Federated States, if any, within which that tax is leviable in that year, and shall be distributed among the Provinces and those States in such manner as may be prescribed :

Provided that—

(*a*) the percentage originally prescribed under this subsection shall not be increased by any subsequent Order in Council ;

(*b*) the Federal Legislature may at any time increase the said taxes by a surcharge for Federal purposes and the whole proceeds of any such surcharge shall form part of the revenues of the Federation.

(2) Notwithstanding anything in the preceding subsection, the Federation may retain out of the moneys assigned by that subsection to Provinces and States—

(*a*) in each year of a prescribed period such sum as may be prescribed ; and

(*b*) in each year of a further prescribed period a sum less than that retained in the preceding year by an amount, being the same amount in each year, so calculated that the sum to be retained in the last year of the period will be equal to the amount of each such annual reduction :

Provided that—

(i) neither of the periods originally prescribed shall be reduced by any subsequent Order in Council ;

(ii) the Governor-General in his discretion may in any year of the second prescribed period

direct that the sum to be retained by the Federation in that year shall be the sum retained in the preceding year, and that the second prescribed period shall be correspondingly extended, but he shall not give any such direction except after consultation with such representatives of Federal, Provincial and State interests as he may think desirable, nor shall he give any such direction unless he is satisfied that the maintenance of the financial stability of the Federal Government requires him so to do.

(3) Where an Act of the Federal Legislature imposes a surcharge for federal purposes under this section, the Act shall provide for the payment by each Federated State in which taxes on income are not leviable by the Federation of a contribution to the revenues of the Federation assessed on such basis as may be prescribed with a view to securing that the contribution shall be the equivalent, as near as may be, of the net proceeds which it is estimated would result from the surcharge if it were leviable in that State, and the State shall become liable to pay that contribution accordingly.

(4) In this section—

'taxes on income' does not include a corporation tax;

'prescribed' means prescribed by His Majesty in Council; and

'Federal emoluments' includes all emoluments and pensions payable out of the revenues of the Federation or of the Federal Railway Authority in respect of which income-tax is chargeable.

See Introduction to this Chapter under INCOME TAX, and NIEMEYER REPORT. This section provides that a specified percentage of the yield of taxes on income, other than agricultural income and corporation tax, is to be assigned to the Provinces. But the revenues derived from taxes on the emoluments of federal officers or the officers of the Federal Railway Authority or taxes on income attributable to Chief Commissioner's Provinces and other federal areas have been permanently assigned to the Federation. The percentage and the principles of distribution among the Provinces are to be fixed by Order in Council, but once fixed, the percentage cannot be increased by a subsequent Order in Council. This percentage is to be distributed among the Provinces on a 'prescribed' basis. Once the basis is fixed by Order in Council, it is unalterable. In a memorandum to the Joint Select Committee, the Secretary of State observed that, although permanent principles may be laid down, the working of these principles might necessitate periodical revision of these percentages. It was, however, contemplated that this process should be

more or less of an automatic kind and might perhaps be delegated under the Order in Council to some authority in India such as the Auditor-General. As to the scope and effect of these Orders in Council, see Introduction to this Chapter under INCOME-TAX.

The Federal Legislature has been empowered to impose a surcharge and to retain the whole proceeds of any such surcharge for its purposes. Where an Act of the Federal Legislature imposes a surcharge for federal purposes, the Act is to provide for the payment by each Federated State in which taxes on income are not leviable by the Federation, of a contribution to the revenues of the Federation assessed on such basis as may be prescribed.

The circumstances in which the federal surcharge or income-tax is imposable are governed by par. XXIII of the Instrument of Instructions:

> Before granting his previous sanction to the introduction of a Bill into the Federal Legislature imposing a federal surcharge or taxes on income, our Governor-General shall satisfy himself that the results of all practicable economies and of all practicable measures for increasing the yield accruing to the Federation from other sources of taxation within the powers of the Federal Legislature would be inadequate to balance federal receipts and expenditure on revenue account and among the aforesaid measures shall be included the exercise of any powers vested in him in relation to the amount of the sum retained by the Federation out of moneys assigned to Provinces from taxes on income.

The conditions under which the States were ready to accept the proposal of contribution to the federal fisc in times of serious financial stress, were explained in a statement made to the Joint Parliamentary Committee on behalf of the Indian States delegates. The States accept their liability to contribute in an emergency after the prescribed period when the provincial share of the income-tax has been completely assigned to the units. But even during this prescribed period, if the financial position becomes such that the federal expenditure cannot be met from sources of revenue permissible to the Federal Government, after all possible economies had been effected and the resources of indirect taxation open to the Federation exhausted and the return of the income-tax to the Provinces suspended, a state of emergency will be held to have come into being when all federal units will contribute to the federal fisc on an equitable and prescribed basis. The proceeds of the surcharge are to be devoted solely to federal purposes.

Basis of contribution

As to the basis on which the States are to make this contribution, the Secretary of State made the following statement to the Joint Select Committee:

> The difficulty here is that the States will, under special circumstances, contribute to a surcharge on something which does not exist in the States (unless the State has agreed to accept federal legislation on income as applying to that State). It is unlikely that it will be possible to take as the basis of their share any assessment of what the surcharge would yield if it was actually in operation in the States. No final proposal has as yet been made as to the best basis to be used. It might, for example, be a contribution on the basis of population, but it is unlikely that this would be a very suitable test. A more suitable suggestion is that the contribution should be in proportion to the revenues of each State and of British India. Possibly to prevent constant investigation into the revenues

of the States, percentages might be fixed which would hold good for a term of years as representing approximately revenue proportions. In such a case once the principle has been laid down, power to fix the percentages might again be delegated to, say the Auditor-General in India.

States will not, however, be required to contribute any counterpart to the special addition (i.e. surcharge) of taxes, on income levied in 1931, if and so long as those additions are still being imposed when the Federation comes into being.

It is to be observed that the States are not to contribute to an increase of income-tax but only to surcharge. The Federal Government will have the option of calling it a surcharge or an increase in the basic rate of tax, and the incidence will be different according as it is called by one name or the other. But it will be to the interest of the Federal Government to levy a surcharge, as, in that case, no share of the increased tax will be allocated to the units entitled to a share in the proceeds of the income-tax. To remove this difficulty, the States have suggested that a basic rate of income-tax should be fixed, as to which the States will not make any contribution, and any increase over the rate should be deemed to be a surcharge with liability on the States to contribute their quota.

The difficulty will not obviously arise in the case of the Federated States who have agreed to accept federal legislation in income-tax (except corporation tax) and the Act makes provisions for assignment to those states of such portion of the proceeds of the tax as may be agreed upon.

Agricultural income

For the purposes of this Act, the Act adopts the definition of 'agricultural income' as given in enactments relating to Indian income-tax.[1]

The term 'agricultural income' is defined in s. 2(1) of the Indian Income-Tax Act, 1922, as follows :[2]

'Agricultural income' means—

(*a*) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of Government as such.

(*b*) any income derived from such land by—

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii).

(*c*) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent-in-kind, of any land with respect to which or the produce of which any operation mentioned in sub-clause (ii) and (iii) of clause (*b*) is carried on :

[1] See s. 311(2).

[2] Act XI of 1922.

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his connection with the land, requires as a dwelling-house, or as a store-house or other out-building.

The sources of income which are deemed 'agricultural' are excluded from the operation of the Income-Tax Act. The incomes which fall within the definition of 'agricultural income' within the meaning of s. 2(1) are not only exempt from income-tax but cannot also be included in computing a man's total income under s. 14(1) of the Income-Tax Act.

The Act excludes 'agricultural income' from the sphere of federal taxation, but confers a right on the Provinces to levy and collect taxes on 'agricultural income'. In the Income-Tax Act of 1860, agricultural income was taxed. This was abolished in 1865. In 1869, a tax was levied upon all incomes including agricultural income, but in 1873-4, this was again given up.

The definition of 'agricultural income' as set out in the Income-Tax Act imposes the following conditions :

1. The land must be used for agricultural purposes.
2. The land must also be
   (i) either assessed to land revenues or
   (ii) subject to a local rate assessed and collected by officers of Government as such.

There is no definition in the Income-Tax Act of the term 'agricultural'. The definitions of 'agricultural' in the Bengal Tenancy Acts are clearly inapplicable to income-tax. 'The primary meaning of "agriculture" is the cultivation of the ground (in the Century Dictionary) and in its general sense, it is the cultivation of the ground for the purpose of procuring vegetables and fruits for the use of man and beast, including gardening or horticulture and the raising or feeding of cattle and other stock (Anderson's Dictionary of Law). Its less general and more ordinary signification is the cultivation with the plough, and in large areas in order to raise food for men and beast or in other words, that species of cultivation which is intended to raise grain and other field crops for man and beast. Horticulture which denotes the cultivation of gardens or orchards is a species of agriculture in its primary and more general sense'—per Bhashyam Aiyangar, J., in *Murugesa Chetti* v. *Chinnathambi Goundan* [1] in which case the question whether a lease was agricultural or not, was discussed. This definition of agriculture was however considered too narrow in *Panadai Pathan* v. *Ramaswami* [2] in which case the same question was again raised and the denotation of the term was made wider. In this case, Spencer, J. observed :

> With due deference, while accepting that the case was rightly decided, I am unable to follow the opinion of Bhashyam Aiyangar, J. in *Murugesa Chetti* v. *Chinnathambi Goundan*, that the word 'agriculture' in its more general sense comprehends the raising of vegetables, fruits and other garden products as food for man and beast, if the learned judge intended thereby to limit it to the raising of food products. For to so restrict the word would be to exclude indigo, cotton, jute, flower, tobacco and other such cultivation. For the purposes of that particular case which related to a

[1] (1901) 24 Mad. 421.

[2] (1922) 45 Mad. 710.

lease of betel gardens considering the policy of favouring agriculture upon finding that they produced a form of food, the connection between agriculture and the production of food may have seemed important but such a limitation is not supported by the definition of agriculture in the Oxford Dictionary, which is 'the Science and Art of cultivating the soil, tillage, husbandry, farming (in its widest sense). This dictionary notes that a meaning restricted to tillage is rare. In Bouvier's Law Dictionary, 'agriculture' is defined as the cultivation of the soil for food products or any other useful or valuable growths of the field or garden .... I am equally unable to agree with the narrow definition of Sadashiva Ayyar, J. in *Sheshayya* v. *Rajah of Pitapuram*; and *Rajah of Venkatagiri* v. *Ayyappa Reddi* (1915) I.L.R. 38 Mad. 738 that agriculture means the raising of annual or periodical grain and crop through the operation of ploughing, sowing, etc., though the decision may be perfectly sound so far as they excluded pasture lands from 'ryoti land' for the purpose of Madras Estate Land Act. The learned judge's definition would exclude sugarcane, indigo, tea, flower, tobacco and betel cultivation from agriculture. In my opinion, agriculture connotes the raising of useful or valuable products which derive nutriment from the soil with the aid of human skill and labour and thus it will include horticulture, arboriculture, and sylviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operations as those of ploughing, sowing, planting, pruning, manuring, watering, protecting, etc.

The following have been held to be 'agricultural income':

Income from pasturage and from fees realized from graziers: *Probhatchandra Barua* v. *Commissioner of Income-Tax.*[1]

Salami paid for settlement of waste lands or abandoned holdings. *Birendra Kishore Manikya* v. *Secretary of State for India.*[2]

Salami or *Nazer* paid by a tenant to a landlord for his recognition as a tenant to a non-transferable holding. *Maharajah of Darbhanga* v. *Commissioner of Income-Tax.*[3] *Meher Banu* v. *Secretary of State.*[4]

Mutation fees paid by the tenant to the landlord as such upon succeeding to holding or tenure by inheritance is income derived from land used for agricultural purposes. *Rajendra Narayan Bhanja Deo* v. *Commissioner of Income-Tax.*[5]

The following are not 'agricultural income':

Maintenance allowance received from Zeminder's property. *Zeminderni of Tiruvur* v. *Commissioner of Income-Tax.*[6]

Profits from a Mela: *Umad Rasul* v. *Anath Bandhu.*[7]

Income from stone quarries: *Shiblal* v. *Gangaram.*[8]

Incomes derived from markets, fisheries, mooring or ferries: *Probhatchandra Barua* v. *Commissioner of Income-Tax,*[9] *Maharajadhiraja of Darbhanga* v. *Commissioner of Income-Tax,*[10] *Commissioner of Income-Tax* v. *Sevugu Pandia Thevar.*[11]

1 57 I.A. 228: (1931) 58 Cal. 430.
2 (1921) 48 Cal. 766, P.C.
3 (1928) 7 Pat. 550.
4 (1926) 53 Cal. 34.
5 (1930) 9 Pat. 1, F.B.
6 (1929) 52 Mad. 827.
7 (1901) 28 Cal. 637.
8 (1927) 50 All. 98.
9 (1930) 58 Cal. 430 P.C.
10 (1924) 3 Pat. 470, 485.
11 (1933) 56 Mad. 251.

The Government of India (Distribution of Revenues) Order, 1936

By paragraph 5 of this Order in Council, the prescribed percentage of income-tax to be assigned under s. 138(1) to the Provinces and the Federated States has been fixed at 50 per cent., and this amount is to be divided among the Provinces in the manner recommended in the Niemeyer Report—see above. By paragraph 6 of the Order: (A) the first of the periods to be prescribed under s. 138(2) is to be five years from the commencement of Part III of the Act; (B) the prescribed sum that may be retained by the Federation under s. 138(2) (*a*) is to be the whole or such portion of the sum which is assigned to the Province or Federated State, as will together with (i) the Federation's share of the divisible net proceeds of the income-tax for the year and (ii) any general budget receipts from the railways, will make up a total of 13 crores; i.e. the sum to be retained by the Federation out of the share of income-tax assigned to the Province is to be the amount by which the total of (i) and (ii) above falls short of 13 crores; (C) the second period to be prescribed under s. 138(2) is to be five years; during this second period, in the first year, the amount to be retained is to be five-sixths of the sum, if any, retained in the last year of the first prescribed period of five years, decreasing by a further sixth of that sum in each of the succeeding five years. Divisible net proceeds of income-tax means the net proceeds of the tax referred to in s. 138, excepting proceeds attributable to Chief Commissioners' Provinces, taxes payable in respect of federal emoluments, and proceeds of any surcharge for federal purposes.

Corporation tax

139.—(1) Corporation tax shall not be levied by the Federation in any Federated State until ten years have elapsed from the establishment of the Federation.

(2) Any Federal law providing for the levying of corporation-tax shall contain provisions enabling the Ruler of any Federated State in which the tax would otherwise be leviable to elect that the tax shall not be levied in the State, but that in lieu thereof there shall be paid by the State to the revenues of the Federation a contribution as near as may be equivalent to the net proceeds which it is estimated would result from the tax if it were levied in the State.

(3) Where the Ruler of a State so elects as aforesaid, the officers of the Federation shall not call for any information or returns from any corporation in the State, but it shall be the duty of the Ruler thereof to cause to be supplied to the Auditor-General of India such information as the Auditor-General may reasonably require to enable the amount of any such contribution to be determined.

If the Ruler of a State is dissatisfied with the determination as to the amount of the contribution payable by his State in any financial year, he may appeal to the Federal Court, and if he establishes to the satisfaction of that Court that the amount determined is excessive, the Court shall

reduce the amount accordingly and no appeal shall lie from the decision of the Court on the appeal.

Corporation tax is defined in s. 311(2) as meaning 'any tax on so much of the income of companies as does not represent agricultural income, being a tax to which the enactments requiring or authorizing companies to make deductions in respect of income-tax from payments of interest or dividends, or from other payments representing a distribution of profits, have no application'. This definition clearly limits it to taxes on income and does not include taxes on capital. It is in reality, a super-tax on the profits of companies. But the description of super-tax in the Indian Income-Tax Act does not provide any clear basis of differentiation between income-tax and super-tax and the definition in present Act makes such differentiation. The definition includes a tax of the nature of the existing Indian super-tax on companies, while excluding one like the Indian income-tax which, while in form levied on companies is really in effect passed on to the shareholders. This section provides that the Federation should retain the yield of this tax and that after ten years have elapsed after the establishment of the Federation, the tax will be extended to the States, a right being reserved to any State which prefers that companies subject to the law of the State should not be directly taxed, to pay itself to the federal fisc an equivalent lump sum contribution. If the Ruler of a Federated State is dissatisfied with the determination as to the amount of the contribution payable by his state in any financial year, he may appeal to the Federal Court. But the decision of the Federal Court is final.

Salt duties, excise duties and export duties

140.—(1) Duties on salt, Federal duties of excise and export duties shall be levied and collected by the Federation, but, if an Act of the Federal Legislature so provides, there shall be paid out of the revenues of the Federation to the Provinces and to the Federated States, if any, to which the Act imposing the duty extends, sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among the Provinces and those States in accordance with such principles of distribution as may be formulated by the Act.

(2) Notwithstanding anything in the preceding sub-section, one half, or such greater proportion as His Majesty in Council may determine, of the net proceeds in each year of any export duty on jute or jute products shall not form part of the revenues of the Federation, but shall be assigned to the Provinces or Federated States in which jute is grown in proportion to the respective amounts of jute grown therein.

This section empowers the Federal Legislature to assign to Provinces and Federated States in accordance with such schemes of distribution as it may determine the whole or any part of the net revenues derived from salt duties, excise duties and export duties; in the case, however, of

export duties on jute and jute products, an assignment to the producing units will be compulsory and will amount to at least 50 per cent. of the net revenue from the duty. See Introduction to this Chapter.

By paragraph 8 of this Order in Council, the proportion of the net proceeds in each year of any export duty on jute or jute products, which under subsection (2) is to be assigned to the Provinces or Federated States in which jute is grown, shall be 62½ per cent. This was the recommendation in the Niemeyer Report.

Government of India (Distribution of Revenues) Order, 1936

Prior sanction of Governor-General required to Bills affecting taxation in which Provinces are interested

141.—(1) No Bill or amendment which imposes or varies any tax or duty in which Provinces are interested, or which varies the meaning of the expression 'agricultural income' as defined for the purposes of the enactments relating to Indian income-tax, or which affects the principles on which under any of the foregoing provisions of this chapter moneys are or may be distributable to Provinces or States, or which imposes any such federal surcharge as is mentioned in the foregoing provisions of this chapter, shall be introduced or moved in either Chamber of the Federal Legislature except with the previous sanction of the Governor-General in his discretion.

(2) The Governor-General shall not give his sanction to the introduction of any Bill or the moving of any amendment imposing in any year any such Federal surcharge as aforesaid unless he is satisfied that all practicable economies and all practicable measures for otherwise increasing the proceeds of Federal taxation or the portion thereof retainable by the Federation would not result in the balancing of Federal receipts and expenditure on revenue account in that year.

(3) In this section the expression 'tax or duty in which Provinces are interested' means—

(*a*) a tax or duty the whole or part of the net proceeds whereof are assigned to any Province; or

(*b*) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the revenues of the Federation to any Provinces.

This section provides that no Bill or amendment is to be introduced or moved in either Chamber of the Federal Legislature except with the previous sanction of the Governor-General in his discretion, which—

(i) imposes or varies any tax in which Provinces are interested—that is to say, a tax or duty the whole or part of the net proceeds whereof are assigned to any Province; or

(ii) varies the meaning of the expression 'agricultural income' as defined for the purposes of the enactments relating to income-tax; or

(iii) affects the principles on which moneys are or may be distributable to Provinces or States; or

(iv) imposes any such federal surcharge as is mentioned in ss. 137 and 138.

The Joint Select Committee make the following observations [1]:

The fact that the federal units either will, or may, share in the yield from certain federal taxes implies that the federal budget cannot be the concern of the Federal Government and Legislature alone. This may result in some blurring of responsibility and from the point of view of constitutional principles is open to objection; but we see no escape from it. In order to bring about mutual consultation between Federation and units in matters of this kind, the White Paper proposes the Federal Legislation upon them should require the prior assent of the Governor-General to be given only after consultation with both the Federal Ministry and the Government of the units. We are doubtful whether a statutory obligation to consult the units may not give rise to difficulties and we see some advantage in directing the Governor-General in his Instrument of Instructions to ascertain the views of the units by the method which appears to him best suited to the circumstances of the particular case.

See paragraph XXII of the Governor-General's Draft Instrument of Instructions.[2]

142. Such sums as may be prescribed by His Majesty in Council shall be charged on the revenues of the Federation in each year as grants in aid of the revenues of such Provinces as His Majesty may determine to be in need of assistance, and different sums may be prescribed for different Provinces: Grants from Federation to certain Provinces

Provided that, except in the case of the North-West Frontier Province, no grant fixed under this section shall be increased by a subsequent Order, unless an address has been presented to the Governor-General by both Chambers of the Federal Legislature for submission to His Majesty praying that the increase may be made.

This subsection provides for subventions to deficit Provinces.

Sind: The Act creates two new Provinces, Sind and Orissa. It is estimated that there will be for Sind an initial deficit of about 3/4 crore per annum but this will gradually diminish and be ultimately extinguished over a period of some fifteen years, by the end of which time it is believed that the agricultural developments connected with the Sukkur Barrage Scheme will be complete. If Sind were not constituted a separate Province this deficit would fall to be met from Bombay revenues, except for a small sum of about 10 lakhs, the estimated cost of new overhead

[1] See Report par. 262.

[2] Cmd. 4805.

charges brought about by the constitutional changes. The Act therefore provides that a subvention should be given from federal revenues to Sind, of a prescribed, but gradually diminishing amount. Except for the 10 lakhs already mentioned, there is no additional burden imposed upon the tax payers of India as a whole and to that extent relief is given to Bombay.

Orissa : Similar considerations arise in the case of Orissa. This will undoubtedly be a deficit area and will require a subvention of something like 30 lakhs per annum; but of this only about 15 lakhs per annum, which is the estimate of new overhead charges involved any additional burden on federal revenues. Some portion of this amount would in effect have had to be provided by subvention from the centre even if a new Province of Orissa were not constituted. The existing Province of Bihar and Orissa is already faced with serious financial difficulties, aggravated by the recent earthquake and the separation of Orissa only means that the new Province will receive the subvention which would otherwise have come to it indirectly through the Government of Bihar and Orissa.

The subventions to other deficit Provinces also react on federal finance but these would have been necessary under the old constitution, since it is clearly impossible to allow the continued accumulation of deficits by a Province, if over a number of years it is beyond its power within the resources assigned to it, to balance its expenditure and revenue.

The subventions to the Provinces shall be fixed by Order in Council and cannot be increased by a subsequent Order unless an address of the Federal Legislature is presented to the Governor-General for submission to His Majesty, praying for an increase. This of course, does not apply to the case of the North-West Frontier Province in view of its strategic importance. For this Province, see notes to s. 8.

The Government of India (Distribution of Revenues) Order, 1936

By paragraph 9 of this Order in Council, in accordance with the recommendations of the Niemeyer Report, grants to be made under this section to certain Provinces have been fixed as follows:—United Provinces 25 lakhs a year for five years from the commencement of Part III of the Act; Assam 30 lakhs yearly; N.-W.F. Provinces 100 lakhs yearly; Orissa 47 lakhs for the first year after the commencement of Part III of the Act, 43 lakhs for each of the four succeeding years, and thereafter 40 lakhs yearly; Sind 110 lakhs for the first year after the commencement of Part III of the Act, 105 lakhs for each of the next nine years, 80 lakhs for each of the next 20 years, 65 lakhs for each of the next five years, 60 lakhs for each of the next five years, and 55 lakhs for each of the next five years.

Savings

143.—(1) Nothing in the foregoing provisions of this chapter affects any duties or taxes levied in any Federated State otherwise than by virtue of an Act of the Federal Legislature applying in the State.

(2) Any taxes, duties, cesses or fees which, immediately before the commencement of Part III of this Act, were being lawfully levied by any Provincial Government, municipality or other local authority or body for the purposes of the Province, municipality, district or other local area under a law in force on the first day of January,

nineteen hundred and thirty-five, may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Federal Legislative List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by the Federal Legislature.

The Federal Legislature can only impose taxation in a Federated State if so provided in the Instrument of Accession of that State.

Cl.(2) provides for the continuance of taxes, duties, cesses, etc. imposed by any public authority in a Province before this Act came into force in the Provinces, under a law in force on the 1st of January, 1935, though these taxes, etc. have been included in List I or the exclusively Federal List (of the Seventh Schedule). But the Federal Legislature may provide to the contrary.

This clause has been modified for a period of two years from the commencement of Part III of the Act by substitution of 'the date of such commencement for the first day of January, 1935'. See the India and Burma (Transitory Provisions) Order, 1937, paragraph 3. By paragraph 4 of this Order, subject to any provision to the contrary made by any Central or Provincial Act, all taxes or other sums required before the commencement of Part III of the Act to be credited to any local fund, shall during the next two financial years after the commencement of Part III, continue to be so credited, and are not to form part of the provincial revenue; similarly, any expenditure from provincial revenue prescribed by any law in force immediately before the commencement of Part III shall for the said period be deemed to be an expenditure charged on the revenues of the Province. See s. 78 (3).

Calculation of 'net proceeds', etc.

144.—(1) In the foregoing provisions of this chapter 'net proceeds' means in relation to any tax or duty the proceeds thereof reduced by the cost of collection, and for the purposes of those provisions the net proceeds of any tax or duty, or of any part of any tax or duty, in or attributable to any area shall be ascertained and certified by the Auditor-General of India, whose certificates shall be final.

(2) Subject as aforesaid, and to any other express provision of this chapter, an Act of the Federal Legislature may, in any case where under this Part of this Act the proceeds of any duty or tax are, or may be, assigned to any Province or State, or a contribution is, or may be, made to the revenues of the Federation by any State, provide for the manner in which the proceeds of any duty or tax and the amount of any contribution are to be calculated, for the times in each year and the manner at and in which any payments are to be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.

For the appointment and conditions of services of the Auditor-General of India, see s. 166.

Under ss. 137, 138 and 140(2), the proceeds of certain duties and taxes collected by the Federation are to be paid over, wholly or in part to certain Provinces and under s. 140(1), the Federal Legislature may by an Act, distribute the whole or part of duties on salt, duties of excise and export duties collected by the Federation. In these cases, the Federal Legislature may make laws regulating the manner in which such duties and taxes are to be calculated, paid over or adjusted.

The Crown and the States

Expenses of the Crown in connection with Indian States

145. There shall be paid to His Majesty by the Federation in each year the sums stated by His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States to be required, whether on revenue account or otherwise, for the discharge of those functions, including the making of any payments in respect of any customary allowances to members of the family or servants of any former Ruler of any territories in India.

By s. 2, it has been provided that the powers connected with the exercise of the functions of the Crown in its relations with the Indian States, vested in His Majesty, are to be exercised in India only by His Majesty's Representative or the Viceroy, or persons authorized by him. These powers come under Paramountcy and are not affected by this Act.[1]

The expenses in connexion with the exercise of the functions of the Crown in its relations with the Indian States are to be paid to His Majesty from the revenues of the Federation on which they are charged.[2] If the Viceroy requires the assistance of armed forces from British India for the purpose of discharging his functions in relations to any Indian State, such armed forces shall be furnished and the expenses in this connexion shall be regarded as expenses of His Majesty in discharging the functions of the Crown in its relations to the States. The Viceroy may arrange with the Governor of any Province and provincial officers about the discharge of any such functions by them on his behalf.[3]

Certain provisions of the old Act with amendments consequential on the provisions of the new Act, are to remain in force.[4] The presentation of the Budget by the Governor-General on the first April, 1937, was to be regulated by s. 67A of the old Act, as modified in the Ninth Schedule. S. 67A (3) (v) deals with the payments mentioned in s. 145. The Governor-General, before the appointment under s. 3 of the new Act of His Majesty Representative, is to make the statement required by s. 145.

[1] See notes to s. 2 under PARAMOUNTCY and Introduction to Part III, Chapter II under this head.

[2] See s. 33(3) (*f*).

[3] See ss. 286 and 287.

[4] See notes to s. 33 under s. 317.

146. All cash contributions and payments in respect of loans and other payments due from or by any Indian State which, if this Act had not been passed, would have formed part of the revenues of India, shall be received by His Majesty, and shall, if His Majesty has so directed, be placed at the disposal of the Federation, but nothing in this Act shall derogate from the right of His Majesty, if he thinks fit so to do, to remit at any time the whole or any part of any such contributions or payments. Payments from or by Indian States

See notes to s. 147.

Cash contributions are defined in s. 147(5). These are known as tributes payable by an Indian State. The Joint Parliamentary Committee recommended the gradual allocation over a period of years (corresponding to the period during which it is proposed to defer the full assignment to the Provinces of a share of the income-tax) of any contribution paid by a State to the Crown in excess of the value of the immunities it enjoys.

147.—(1) Subject to the provisions of sub-section (3) of this section, His Majesty may, in signifying his acceptance of the Instrument of Accession of a State, agree to remit over a period not exceeding twenty years from the date of the accession of the State to the Federation any cash contributions payable by that State. Remission of States contributions

(2) Subject as aforesaid, where any territories have been voluntarily ceded to the Crown by a Federated State before the passing of this Act—

(*a*) in return for specific military guarantees, or

(*b*) in return for the discharge of the State from obligations to provide military assistance,

there shall, if His Majesty, in signifying his acceptance of the Instrument of Accession of that State, so directs, be paid to that State, but in the first-mentioned case on condition that the said guarantees are waived, such sums as in the opinion of His Majesty ought to be paid in respect of any such cession as aforesaid.

(3) Notwithstanding anything in this section—

(*a*) every such agreement or direction as aforesaid shall be such as to secure that no such remission or payment shall be made by virtue of the agreement or direction until the Provinces have begun to receive moneys under the section of this chapter relating to taxes on income, and, in the case of a remission, that the remission shall be complete before the expiration of twenty years from the date of

the accession to the Federation of the State in question, or before the end of the second prescribed period referred to in subsection (2) of the said section, whichever first occurs; and

(*b*) no contribution shall be remitted by virtue of any such agreement save in so far as it exceeds the value of any privilege or immunity enjoyed by the State; and

(*c*) in fixing the amount of any payments in respect of ceded territories, account shall be taken of the value of any such privilege or immunity.

(4) This section shall apply in the case of any cash contributions the liability for which has before the passing of this Act been discharged by payment of a capital sum or sums, and accordingly His Majesty may agree that the capital sum or sums so paid shall be repaid either by instalments or otherwise, and such repayments shall be deemed to be remissions for the purposes of this section.

(5) In this chapter 'cash contributions' means—

(*a*) periodical contributions in acknowledgment of the suzerainty of His Majesty, including contributions payable in connection with any arrangement for the aid and protection of a State by His Majesty, and contributions in commutation of any obligation of a State to provide military assistance to His Majesty, or in respect of the maintenance by His Majesty of a special force for service in connection with a State, or in respect to the maintenance of local military forces or police, or in respect of the expenses of an agent;

(*b*) periodical contributions fixed on the creation or restoration of a State, or on a re-grant or increase of territory, including annual payments for grants of land on perpetual tenure or for equalization of the value of exchanged territory;

(*c*) periodical contributions formerly payable to another State but now payable to His Majesty by right of conquest, assignment or lapse.

(6) In this chapter 'privilege or immunity' means any such right, privilege, advantage or immunity of a financial character as is hereinafter mentioned, that is to say—

(a) rights, privileges or advantages in respect of, or connected with, the levying of sea customs or the production and sale of untaxed salt;

(b) sums receivable in respect of the abandonment or surrender of the right to levy internal customs duties, or to produce or manufacture salt, or to tax salt or other commodities or goods in transit, or sums receivable in lieu of grants of free salt;

(c) the annual value to the Ruler of any privilege or territory granted in respect of the abandonment or surrender of any such right as is mentioned in the last preceding paragraph;

(d) privileges in respect of free service stamps or the free carriage of State mails on government business;

(e) the privilege of entry free from customs duties of goods imported by sea and transported in bond to the State in question; and

(f) the right to issue currency notes,

not being a right, privilege, advantage or immunity surrendered upon the accession of the State, or one which, in the opinion of His Majesty, for any other reason ought not to be taken into account for the purposes of this chapter.

(7) An Instrument of Accession of a State shall not be deemed to be suitable for acceptance by His Majesty, unless it contains such particulars as appear to His Majesty to be necessary to enable due effect to be given to the provisions of this and the next but one succeeding sections, and in particular provision for determining from time to time the value to be attributed for the purposes of those provisions to any privilege or immunity the value of which is fluctuating or uncertain.

See J.C.R. 263, 271.

A certain number of States pay tribute to the Crown, which forms part of the central revenues. The amounts vary from Rs.24·5 lakhs in the case of Mysore (which was before 1928 Rs.35 lakhs) to Rs.3 in the case of a small State named Ravasan in the Mohikantha Agency in the Bombay Presidency. The tributes are payable in accordance with the terms of treaties on which territories were exchanged or restored or on which adjustment of claims between the Government of India and the State was made. In many cases, the tribute is paid in full discharge of obligations to maintain or supply troops. The total of these tributes amounts to Rs.72·02 lakhs. It was recommended by the Indian States Enquiry Committee, 1932, that there should be a gradual abolition over a period of years (corresponding to the period during which it was pro-

posed to defer the full assignment to the Provinces of a share of the income-tax) of any State contribution in excess of the value of the immunities it enjoys.

Cl. (*1*) *:* The tributes (called cash contributions in this Act) may be abolished gradually,—His Majesty under s. 146 having the right to remit the whole or part—the abolition being *pari passu* with the assignment of the provincial share of the proceeds of income-tax to the Provinces. Relief will be given to the States because it is anomalous that some units of the Federation, alone, should be making payments of this description.

Cl. (*2*) *:* The Act recognizes the claims of those States which in the past have ceded territory in return for protection, to some form of relief, equally with the States now paying cash contributions, because the origin of tributes and of ceded territories is the same.

The sum involved is between Rs. ·75 crore to Rs. 1 crore [1] :

When giving credit to a State for the contributions made by it, it is to be debited with the value of privileges or immunities which it enjoys.[2] Any assignment or distribution of revenues from federal sources to State members of the Federation will be subject to such condition as may be laid down by Act of the Federal Legislature for the purpose of effecting adjustments in respect of any special privilege or immunity of a financial character enjoyed by the State, which has not otherwise been taken into account.[3]

Cl. (*5*) *:* For tributes or cash contributions, see notes under s. 146.

Cl. (*6*) *:* The privileges or immunities which the States enjoy may be classified under the following heads :

(i) Certain States levy their own customs duty and enjoy immunity from contribution to the central customs revenue. The total amount under this head has been estimated by the Indian States Enquiry Committee to be 182·42 lakhs of rupees. The States (Mysore is the chief exception) are permitted to levy land customs and transit duties, while seaborne trade (with certain exceptions) is not subject to States customs duty. Under special arrangements made with Travancore and Cochin, proceeds of duties collected in the port of Cochin are shared by these two States and the Government of India. Import duties are also levied on seaborne goods by certain minor States, but duties in respect of goods consumed in British India are refunded to the Government of India. Bhavanagar is a free port and keeps customs even on goods passing into British India. The Government of India have entered into an inter-portal convention with Travancore by which the State is compensated for its loss of sea customs duty by a consolidated sum from the central revenues.

(ii) Certain States (Travancore and Kathiawar) manufacture their own salt and enjoy immunity from contribution to the central salt revenue. The total amount is estimated to be about 46·06 lakhs.

(iii) Immunities enjoyed by certain States in respect of the postal and telegraphic rates fall under the following heads :

(*a*) Certain States enjoy the privilege of having their official correspondence carried free of charge by the Indian Postal department ; estimated cost Rs.7·14 lakhs.

(*b*) Certain States receive free annual grants of service stamps ; estimated cost Rs.3·12 lakhs.

[1] See J.C.R. 271.

[2] See subsection (6).

[3] See s. 149.

(*c*) Some States (Gwalior, Patiala, Jind and Nabha) maintain separate postal systems and have entered into conventions with the Government of India.

(*d*) Certain States (ten States including Hyderabad, Travancore and Cochin) have postal systems without entering into any conventions with the Government of India. (The Government of India have maintained their own offices in some towns in these States. Correspondence addressed to places outside the States must be posted at these offices. Otherwise both British India and State postage will have to be paid).

The Indian States Enquiry Committee were of opinion that it was not possible to estimate the money value of immunities under clauses (*c*) and (*d*) above.

(iv) The right to issue currency notes. Hyderabad alone possesses a paper currency, the face value of its notes in circulation being over Rs. ·9 crore.

The Act is silent as to on what basis the privileges or immunities are to be valued or who is to value them. This will be settled in the Instrument of Accession.

Cl. (7) *:* Under s. 6(4), His Majesty is not bound to accept an Instrument of Accession unless he thinks it proper to do so, and he will not accept it if the terms of the Instrument are inconsistent with the scheme of the Federation embodied in this Act. One of the necessary conditions for acceptance of the Instrument of Accession of a State is that it shall contain terms embodying the provisions of ss. 147 and 149. The value to be assigned to any privilege or immunity fluctuating or uncertain in its nature must be determined from time to time.

Certain payments to Federated States, etc., to be charged on Federal revenues

148. Any payments made under the last preceding section and any payments heretofore made to any State by the Governor-General in Council or by any Local Government under any agreements made with that State before the passing of this Act, shall be charged on the revenues of the Federation or on the revenues of the corresponding Province under this Act, as the case may be.

Charges on the revenues of the Federation or of the Province

See ss. 33(3), and 78(3). They are non-votable. The excess of the value of the privilege or immunity enjoyed by the Federated State over the cash contributions made by it is to be paid over to the State and the payment is a charge on the revenues of the Federation. If there be any debit balance against the State, it may be remitted by His Majesty.[1] But any payment made before the Act to a State by the Federation or a Province, not being regarded under s. 147 as a privilege or immunity, shall continue to be paid, and shall form a charge on the revenues of the Federation.

[1] See s. 147(3) (*b*).

Value of privileges and immunities to be set off against share of taxes, etc., assigned to Federated States

149. Where under the foregoing provisions of this chapter there is made in any year by the Federation to a Federated State any payment or distribution of, or calculated by reference to, the net proceeds of any duty or tax, the value in and for that year of any privilege or immunity enjoyed by that State in respect of any former or existing source of revenue from a similar duty or tax or from goods of the same kind, being a privilege or immunity which has not been otherwise taken into account, shall, if and in so far as the Act of the Federal Legislature under which the payment or distribution is made so provides, be set off against the payment or distribution.

See s. 147 and notes thereunder. The Instrument of Accession for each State should contain sufficient particulars to enable due effect to be given to the provisions of s. 147 and this section, and, in particular, provisions to determine from time to time the value of any fluctuating or uncertain privilege and immunity. Otherwise such an Instrument will not be accepted by His Majesty. The mode of ascertaining the value of the privileges of immunities is to be agreed upon and prescribed in the Instrument itself.

Miscellaneous Financial Provisions

Expenditure defrayable out of Indian revenues

150.—(1) No burden shall be imposed on the revenues of the Federation or the Provinces except for the purposes of India or some part of India.

(2) Subject as aforesaid, the Federation or a Province may make grants for any purpose, notwithstanding that the purpose is not one with respect to which the Federal or the Provincial Legislature, as the case may be, may make laws.

Cl. (1)

S. 20(1) of the old Act provided that 'the revenues of India shall be applied for the purpose of the Government of India alone'. This is reproduced in the White Paper.[1] Subject to this restriction, it is open to the Federation or to a Province to make grants for a purpose even if it be a purpose for which the Federal or the Provincial Legislature cannot make laws. The law is meant to discourage expenditure for other than purely Indian purposes. A question may arise as to the power of the Legislature to vote money towards expenses for Indian troops for service outside India on occasions which in the Governor-General's decision do not involve the defence of India in the broadest sense, or to vote simply money as contribution to Great Britain for such occasions. If the defence of India is in no way involved, such expenditure, it may be urged, is not for the purposes of India and so a vote for such expenditure from Indian revenues would be outside the competence of the Legislature. The Joint Parliamentary Committee discussed this matter.[2] They were of opinion that it might on occasion

[1] W.P. Prop. 150.

[2] Report, par. 178.

be in India's general interest to make a contribution towards the cost of external operations and that a contribution in the general interest of India would come within the scope of the provision of old s. 20(1) of the Government of India Act. The Joint Parliamentary Committee say:

> If, therefore, the question should arise of offering a contribution from India's revenues in the circumstances we are discussing (and the interests in question did not fall under the other reserved department of external affairs) we are of opinion that it would need to be ratified by the Federal Legislature.

No doubt, there is the precedent of India's heavy contribution of considerably over £100,000,000 sterling referred to by the Simon Commission,[1] but it can be said that on that occasion, the world-wide extent of the War seriously endangered India's position, and so the money was necessary for the defence of India. It is not clear how far contributions made from India's revenues by the Federal Legislature in the circumstances referred to by the Joint Parliamentary Committee [2] would come strictly under this section. In this connexion, it is of importance to note old s. 22 which laid down that except for preventing or repelling actual invasion of India or under other sudden and urgent necessity, Indian revenue is not, without the consent of both Houses of Parliament, to be applied to defray the expenses of any military operations carried on beyond the frontiers of India by troops paid for out of the Indian revenues. The contribution of India during the Great War was made under this old section which however has not been enacted in this Act; thereby a greater power over expenditure has been given to the Indian Legislature.

Provisions as to the custody of public moneys

151.—(1) Rules may be made by the Governor-General and by the Governor of a Province for the purpose of securing that all moneys received on account of the revenues of the Federation or of the Province, as the case may be, shall, with such exceptions, if any, as may be specified in the rules, be paid into the public account of the Federation or of the Province, and the rules so made may prescribe, or authorise some person to prescribe, the procedure to be followed in respect of the payment of moneys into the said account, the withdrawal of moneys therefrom, the custody of moneys therein, and any other matters connected with or ancillary to the matters aforesaid.

(2) In the exercise of his powers under this section the Governor-General or a Governor shall exercise his individual judgment.

Exercise by Governor-General of certain powers with respect to Reserve Bank

152.—(1) The functions of the Governor-General with respect to the following matters shall be exercised by him in his discretion, that is to say—

(*a*) the appointment and removal from office of the Governor and Deputy Governors of the Reserve Bank of India, the approval of their

[1] Sim. C. R. Vol. II, par. 203. [2] J.C.R. 178.

salaries and allowances, and the fixing of their terms of office ;

(b) the appointment of an officiating Governor or Deputy Governor of the Bank ;

(c) the supersession of the Central Board of the Bank and any action consequent thereon ; and

(d) the liquidation of the Bank.

(2) In nominating directors of the Reserve Bank of India and in removing from office any director nominated by him, the Governor-General shall exercise his individual judgment.

A Reserve Bank for British India has been constituted under the Reserve Bank of India Act, 1934 (Act II of 1934). The function of the Bank is to regulate the issue of bank-notes and the keeping of reserves with a view to securing the monetary stability in British India and generally to operate the currency and the credit system of the country to its advantage. The share capital of the Bank is five crores of rupees divided into shares of one hundred rupees. The general superintendence and direction of the affairs and business of the Bank are entrusted to a Central Board of Directors, consisting of a Governor and two Deputy Governors to be appointed by the Governor-General in Council (under the old constitution), four directors to be nominated by the Governor-General in Council, eight directors to be elected on behalf of the shareholders and one Government official to be nominated by the Governor-General in Council. This section provides that the Governor-General is to exercise in his discretion certain functions in relation to the Bank.

These powers have hitherto been exercised by the Governor-General in Council but when the provisions of this section will come into force, they will be exercised by the Governor-General in his discretion. In nominating the Directors of the Bank, however, and in removing from office any Director nominated by him, the Governor-General is to exercise his individual judgement.

It is further provided in the next section that the previous sanction of the Governor-General at his discretion is necessary to the introduction of legislation in either Chamber of the Legislature affecting the provisions of the Reserve Bank Act which regulate the powers and duties of the Bank in relation to the management of coinage, currency, and exchange of the Federation, or the constitution or functions of the Bank.

Previous sanction of Governor-General to legislation with respect to Reserve Bank, currency and coinage

153. No Bill or amendment which affects the coinage or currency of the Federation or the constitution or functions of the Reserve Bank of India shall be introduced into or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

[1] The White Paper proposals required the previous sanction of the Governor-General in his discretion to the introduction of legislation

[1] See s. 152 and notes thereunder.

affecting that portion of the Reserve Bank Act which regulates the powers and duties of the Bank in relation to the management of currency and exchange; but these proposals did not touch the constitution of the Bank itself.[1] This was thought to be insufficient as amendments could be made to other important portions of the Act, which might have the effect of prejudicing the proper functioning of the Bank. So the Joint Committee recommended that any amendment of the Reserve Bank Act or any legislation affecting the constitution or functions of the Bank or of coinage and currency of the Federation, should require the previous sanction of the Governor-General in his discretion. This recommendation has been incorporated in this section.

154. Property vested in His Majesty for purposes of the government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a Province or Federated State:

Exemption of certain public property from taxation

Provided that, until any Federal law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto.

Public property for the purposes of the government of the Federation is to be exempt from all taxation whether in a Province or in a Federated State, unless otherwise provided by federal legislation. But such property liable to provincial tax before the inauguration of provincial autonomy shall continue to be so liable until otherwise provided by any federal law. Similarly, s. 155 provides that property belonging to a Provincial Government or to the Ruler of a Federated State shall not be liable to federal taxation. But this exception will not apply to the personal property of the Ruler or to any trade or business carried on by the Provincial Government or by a Ruler in British India.

155.—(1) Subject as hereinafter provided, the Government of a Province and the Ruler of a Federated State shall not be liable to federal taxation in respect of lands or buildings situate in British India or income accruing, arising or received in British India:

Exemption of Provincial Governments and Rulers of Federated States in respect of Federal taxation

Provided that—

(*a*) where a trade or business of any kind is carried on by or on behalf of the Government of a Province in any part of British India outside that Province or by a Ruler in any part of British India, nothing in this subsection shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected there-

[1] See J.C.R. 391.

with, or any income arising in connection therewith, or any property occupied for the purposes thereof;

(*b*) nothing in this subsection shall exempt a Ruler from any Federal taxation in respect of any lands, buildings or income being his personal property or personal income.

(2) Nothing in this Act affects any exemption from taxation enjoyed as of right at the passing of this Act by the Ruler of an Indian State in respect of any Indian Government securities issued before that date.

Adjustment in respect of certain expenses and pensions

156. Where under the provisions of this Act the expenses of any court or commission, or the pension payable to or in respect of a person who has served under the Crown in India, are charged on the revenues of the Federation or the revenues of a Province, then if—

(*a*) in the case of a charge on the revenues of the Federation, the court or commission serves any of the separate needs of a Province, or the person has served wholly or in part in connection with the affairs of a Province; or

(*b*) in the case of a charge on the revenues of a Province, the court or commission serves any of the separate needs of the Federation or another Province, or the person has served wholly or in part in connection with the affairs of the Federation or another Province,

there shall be charged on and paid out of the revenues of the Province or, as the case may be, the revenues of the Federation or of the other Province, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India.

Under s. 264(2), one Public Service Commission may serve the needs of two or more Provinces. Under s. 266(2), the Federal Public Service Commission may assist two or more provinces in framing schemes for joint recruitment.

Duty of Federation and Provinces to supply Secretary of State with funds

157.—(1) The Federation and every Province shall secure that there are from time to time in the hands of the Secretary of State sufficient moneys to enable him to make such payments as he may have to make in respect of any liability which falls to be met out of the revenues of the Federation or of the Province as the case may be.

(2) Without prejudice to their obligations under the preceding subsection, the Federation and every Province shall secure that there are from time to time in the hands of the Secretary of State and the High Commissioner sufficient moneys to enable payment to be made of all pensions payable out of the revenues of the Federation or the Province, as the case may be in the United Kingdom or through officers accounting to the Secretary of State or to the High Commissioner.

Expenditure for the discharge of the duties imposed by this Act on the Secretary of State on behalf of the Federation or of a Province is charged on the revenues of the Federation or of the Province. See for example ss. 280(4), 282–84 of this Act. The High Commissioner is appointed under s. 302. The Federation or the Province is to keep him and the Secretary of State in funds to pay for pensions to their officers. For the Secretary of State, his advisers, and his department, see Part XI. See s. 252 for conditions of service of the existing staff of the High Commissioner and of the Auditor of Indian Home Accounts and their salaries, allowances and pensions.

Provisions as to relation of Burma monetary system with India

158.—(1) His Majesty in Council may make such provision as may appear to him to be necessary or proper for defining and regulating the relations between the monetary systems of India and Burma and for purposes connected with or ancillary to those purposes, and in particular, but without prejudice to the generality of this section, such provision as may appear to His Majesty to be necessary or proper for the purpose of giving effect to any arrangements with respect to the said matters made before the commencement of Part III of this Act with the approval of the Secretary of State by the Governor of Burma in Council with the Governor-General in Council or any other persons.

(2) Any sums required by an Order under this section to be paid by the Federation shall be charged on the revenues of the Federation.

As the Joint Parliamentary Committee remark in paragraph 267 of their Report, owing to the separation of Burma, the revenues of India will suffer an estimated loss of as much as Rs.3 crores per annum, less the yield of any revenue duties on imports from Burma which may be introduced from the date of separation.

The separation may result in an undue burden on the revenues of the Federation, so s. 134 of the Burma Act, 1935, provides that His Majesty may by Order in Council make provisions for the payment to the revenues of the Federation out of the revenues of Burma such sums as may appear to him to be proper.

See the India and Burma (Burma Monetary Arrangements) Order, 1937.

For Immigration into Burma from India during a period, after separation, see the Government of Burma (Immigration) Order, 1937.

Relief in respect of tax on income taxable both in India and Burma

159. His Majesty in Council may make provision for the grant of relief from any Federal tax on income in respect of income taxed or taxable in Burma.

A corresponding provision is made in s. 136 of the Burma Act to give relief to income taxed or taxable in the Federation of India from any Burman income-tax.

See the India and Burma (Income-Tax Relief) Order, 1936. If any person who has paid Indian income-tax for any year on any part of his income proves that he has paid for that year Burman income-tax and United Kingdom income-tax, in respect of that part of his income, he is entitled to a refund of Indian tax.

Provisions as to customs duties on India-Burma trade

160. With a view to preventing undue disturbance of trade between India and Burma in the period immediately following the separation of India and Burma and with a view to safeguarding the economic interests of Burma during that period, His Majesty may by Order in Council give such directions as he thinks fit for those purposes with respect to the duties which are, while the Order is in force, to be levied on goods imported into or exported from India or Burma and with respect to ancillary and related matters.

See s. 135 of the Burma Act, and the India and Burma (Trade Regulations) Order, 1937.

CHAPTER II

BORROWING AND AUDIT

Borrowing

161. Upon the commencement of Part III of this Act all powers vested in the Secretary of State in Council of borrowing on the security of the revenues of India shall cease and determine, but nothing in this section affects the provisions of Part XIII of this Act with respect to borrowing in sterling by the Secretary of State. Cessation of borrowing by Secretary of State in Council

Under the old Act, the Secretary of State in Council could borrow money on the security of the revenues of India. Under the new Act, the Council of India has been abolished, as, under the new system of responsible government in India, the Secretary of State in Council could not continue as a statutory corporation.[1] But the Secretary of State will have an advisory Council from three to six in number, of whom one half shall be persons who have held office for at least ten years under the Crown in India and who have retired within two years from the date of appointment as advisers.[2] Part VII and Part X of the Act have been brought into force from the commencement of Part III of the Act, on 1 April 1937. But during the period of transition from that date until the date of establishment of the Federation, it has been provided in Part XIII, s. 315, that the Secretary of State may incur loans on behalf of the Governor-General in Council, though the executive authority of the Federation is authorized under s. 162 to borrow upon the security of the revenues of the Federation. The limits of the loan to be raised by the Federal Government and the conditions regarding guarantee are to be fixed by the Federal Legislature.

For sterling loans, see s. 315.

162. Subject to the Provisions of Part XIII of this Act with respect to borrowing in sterling, the executive authority of the Federation extends to borrowing upon the security of the revenues of the Federation within such limits, if any, as may from time to time be fixed by Act of the Federal Legislature and to the giving of guarantees within such limits, if any, as may be so fixed. Borrowing by Federal Government

See notes under s. 161.

163.—(1) Subject to the provisions of this section, the executive authority of a Province extends to borrowing upon the security of the revenues of the Province within Borrowing by Provincial Governments

[1] See Introduction to Part X.

[2] See s. 278.

such limits, if any, as may from time to time be fixed by the Act of the Provincial Legislature and to the giving of guarantees within such limits, if any, as may be so fixed.

(2) The Federation may, subject to such conditions, if any, as it may think fit to impose, make loans to, or, so long as any limits fixed under the last preceding section are not exceeded, give guarantees in respect of loans raised by, any Province and any sums required for the purpose of making loans to a Province shall be charged on the revenues of the Federation.

(3) A Province may not without the consent of the Federation borrow outside India, nor without the like consent raise any loan if there is still outstanding any part of a loan made to the Province by the Federation or by the Governor-General in Council, or in respect of which a guarantee has been given by the Federation or by the Governor-General in Council.

A consent under this subsection may be granted subject to such conditions, if any, as the Federation may think fit to impose.

(4) A consent required by the last preceding subsection shall not be unreasonably withheld, nor shall the Federation refuse, if sufficient cause is shown, to make a loan to, or to give a guarantee in respect of a loan raised by, a Province, or seek to impose in respect of any of the matters aforesaid any condition which is unreasonable, and, if any dispute arises whether a refusal of consent, or a refusal to make a loan or to give a guarantee, or any condition insisted upon, is or is not justifiable, the matter shall be referred to the Governor-General and the decision of the Governor-General in his discretion shall be final.

The Provincial Government may similarly borrow on the security of the provincial revenues within such limits and with such guarantees as may be fixed by the Provincial Legislature. But the consent of the Federal Government will be required if either (*a*) there is still outstanding any part of a loan advanced or guaranteed by the Federal Government or by the Governor-General in Council before the commencement of this Act, or (*b*) the loan is to be raised outside India. The Federal Government will be empowered to grant loans, or to guarantee a loan, to any Province (within such limits, if any, as may be fixed by provincial legislature) on such terms and conditions as the Federal Government may prescribe. But the Federal Government may refuse the application of a Province or insist upon unreasonable conditions and thus assume the right of controlling the general policy of the Province. So it has been provided in this section that the ultimate decision as to whether consent has been unreasonably withheld or not is to rest with the Governor-General in his discretion, and such decision shall be final.

164. The Federation may, subject to such conditions, if any, as it may think fit to impose, make loans to, or, so long as any limits fixed under the last but one preceding section are not exceeded, give guarantees in respect of loans raised by; any Federated State. Loans by Federal Government to Federated States

The Federation may also grant loans or guarantee (within such limits as may be provided under s. 162) loans, to a Federated State. But a difficulty may arise as to how repayment of such loans may be enforced as against the State. There is no such difficulty in the case of loans, or guarantee of loans, to a Province. Repayment of such loans is charged on the revenues of the Province under s. 78(3) (*b*).

165.—(1) The Colonial Stock Acts, 1877 to 1900, shall, notwithstanding anything to the contrary in those Acts, apply in relation to sterling stock issued after the establishment of the Federation and forming part of the public debt of the Federation as they apply in relation to stock forming part of the public debt of any British Possession mentioned in those Acts, so however that nothing in section twenty of the Colonial Stock Act, 1877, shall be construed as compelling a person desirous of bringing proceedings to proceed in the manner therein specified and that, until Parliament otherwise determines, any conditions prescribed by the Treasury under section two of the Colonial Stock Act, 1900, shall be deemed to have been complied with with respect to all such stock so issued by the Federation. Application of Colonial Stock Acts to stocks issued by Federation

(2) The expression 'colonial stock' in section eleven of the Trusts (Scotland) Act, 1921, shall include any stock in relation to which the said Acts apply by virtue of this section.

(3) In paragraph (*d*) of subsection (1) of section one of the Trustee Act, 1925, the words 'or any other securities the interest in sterling whereon is payable out of, and charged on, the revenues of India' shall be repealed:

Provided that, notwithstanding anything in this Act, any securities which by virtue of the said words were immediately before the commencement of Part III of this Act securities in which a trustee might invest trust funds shall continue to be securities in which a trustee may invest such funds.

Audit and Accounts

Note on audit and accounts

Under the old constitution, the Secretary of State in Council exercised control over the financial administration of India. The control was carried out by the Auditor-General in India and his staff, an agency in India

entirely independent of the Government of India and responsible to the Secretary of State to see that the various Governments in India keep within their powers of expenditure. The Auditor-General was appointed directly by the Secretary of State under old s. 96D, holding office during His Majesty's pleasure. The Secretary of State in Council made provisions by rules, for his pay, powers and duties. He was the final audit authority in India. The report of the Auditor-General was as a matter of practice submitted before the Legislatures in India. The accounts of the expenditure from Indian revenues in England were however audited not by the Auditor-General but by another officer, called the Auditor of Indian Home Accounts, appointed under old s. 27 by His Majesty by warrant under His Sign Manual, countersigned by the Chancellor of the Exchequer. His reports are by statute laid before Parliament.

In India, accounts and audit were carried on by a combined staff under the Auditor-General who was thus responsible not only for audit but also for the preparation of the accounts he audits. This anomalous combination of duties will remain on grounds of economy and other reasons.

The Joint Committee recommended in paragraph 399 :

(1) That the Auditor-General should be appointed by the Crown and his tenure should be similar to that of a High Court Judge, that is during good behaviour and the conditions of service should be laid down by Order in Council.

(2) His duties and powers are to be first prescribed by Order in Council, but the Federal Legislature, subject to previous assent of the Governor-General, may legislate to amend and supplement these provisions.

(3) The cadre of the audit and the accounts department should be fixed by the Federal Government, the salaries being votable unless otherwise prescribed by the Act.

(4) The system of central audit and accounts should apply as at present to the Provinces for at least five years, but the Provinces are to have the right to take over their own audit and accounts after giving three years' notice on the expiry of at least two years from the establishment of provincial autonomy. In that case, the Chief Auditor of the Province is to be appointed by the Crown on condition similar to that of the Auditor-General.

(5) The Auditor-General's Report on the federal accounts is to be submitted to the Governor-General who will lay it before the Federal Legislature. The Report on the provincial accounts is to be submitted to the Governor who will lay it before the Provincial Legislature.

(6) Whether a Province has taken over audit and accounts or not, it is essential that there should be established a uniform general form of accounts for the Federation and for the Provinces.

As regards the Auditor of Indian Home Accounts, the Joint Committee recommended that (1) all expenditure in England from Indian revenues, federal or provincial, should be audited on behalf of the Auditor-General in India by the Home Auditor and his report sent to the Auditor-General for being incorporated in his own report. If the Province has its own Chief Auditor, the Home Auditor should report to him regarding the Home expenditure for the Province ; (2) the Home Auditor should be under the general superintendence of the Auditor-General. The Hom Auditor is to be appointed by the Governor-General in his discretion

His salary (non-votable) and conditions of service (except that his tenure of office and procedure for removing him would be the same as in the case of the Auditor-General) were to be determined by the Governor-General; (3) as regards staff of the Home Auditor, cadre and salaries are to be fixed by the Governor-General in his discretion. The salaries would be votable unless otherwise provided in the Act. The Home Auditor should have the power of appointment and removal of members of his staff. The rights of existing members of the staff should be protected.

The above recommendations have been embodied in ss. 166–70. The powers and duties of the Auditor-General are to be laid down by Order in Council or by a subsequent Act of the Federal Legislature varying the Order, but a Bill for this purpose must have the previous sanction of the Governor-General in his discretion. It is open to the Provincial Legislature to appoint an Auditor-General for the Province but not before the expiry of five years from the commencement of Part III of the Act. But the Joint Select Committee (paragraph 397) think it desirable on the grounds of economy and for other reasons that the present centralized system should be maintained, and they hope that the Provinces will realize the advantages of this course.

The Auditor-General now will have to report to the Governments and Legislatures in India. These Reports will be laid before the Federal or the Provincial Legislature as the case may be. The Auditor-General may give directions as regards the manner of keeping provincial accounts even though a Provincial Auditor-General has been appointed.

The Auditor of Home Accounts is subject to the general superintendence of the Auditor-General. The Report of the Home Auditor is to be sent to the Auditor-General and, if there is a Provincial Auditor-General, the Report on transactions affecting the revenues of the Province is to be sent to him. The Home Auditor may be required by His Majesty to audit the account of the revenues of Burma spent in England.

As the Federal Government has nothing to do with the discharge of the functions of the Crown in its relation with the States, the Report of the Auditor-General on the accounts of expenditure of the Crown in this connexion is to be forwarded to the Secretary of State. The Auditor-General may under s.139(3) call for information from the Ruler of a Federated State to enable him to determine the amount of the contribution which that State may elect to pay in lieu of Corporation Tax.

For Transitory Provisions see paragraph 13 of the Government of India (Commencement and Transitory Provisions) Order, 1936. The procedure, before the commencement of Part III of the Act, is laid down regarding audit of the accounts of the Governor-General in Council by the Auditor-General of India and of the accounts of the Secretary of State in Council by the Auditor of Indian Home Accounts.

166.—(1) There shall be an Auditor-General of India, who shall be appointed by His Majesty and shall only be removed from office in like manner and on the like grounds as a judge of the Federal Court. Auditor-General of India

(2) The conditions of service of the Auditor-General shall be such as may be prescribed by His Majesty in

Council, and he shall not be eligible for further office under the Crown in India after he has ceased to hold his office :

Provided that neither the salary of an Auditor-General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.

(3) The Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Federation and of the Provinces as may be prescribed by, or by rules made under, an Order of His Majesty in Council, or by any subsequent Act of the Federal Legislature varying or extending such an Order :

Provided that no Bill or amendment for the purpose aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion.

(4) The salary, allowances and pension payable to or in respect of an Auditor-General shall be charged on the revenues of the Federation, and the salaries, allowances and pensions payable to or in respect of members of his staff shall be paid out of those revenues.

See notes to s. 200(2) and NOTE ON AUDIT AND ACCOUNTS above.

Cl. (1): For the manner and grounds of removal of a judge of the Federal Court, see s. 200(2) and notes.

Cl. (2): For conditions of service of the Auditor-General and his duties and powers, see the (Audit and Accounts) Order, 1936.

Provincial Auditor-General

167.—(1) If a Provincial Legislature after the expiration of two years from the commencement of Part III of this Act passes an Act charging the salary of an Auditor-General for that Province on the revenues of the Province, an Auditor-General of the Province may be appointed by His Majesty to perform the same duties and to exercise the same powers in relation to the audit of the accounts of the Province as would be performed and exercised by the Auditor-General of India, if an Auditor-General of the Province had not been appointed :

Provided that no appointment of an Auditor-General in a Province shall be made until the expiration of at least three years from the date of the Act of the Provincial Legislature by which provision is made for an Auditor-General of that Province.

(2) The provisions of the last preceding section shall apply in relation to the Auditor-General of a Province and his staff as they apply in relation to the Auditor-

General of India and his staff, subject to the following modifications, that is to say—

(a) a person who is, or has been, Auditor-General of a Province shall be eligible for appointment as Auditor-General of India;

(b) in subsection (3) of the said section, for the reference to the Federal Legislature there shall be substituted a reference to the Provincial Legislature, and for the reference to the Governor-General there shall be substituted a reference to the Governor; and

(c) in subsection (4) of the said section for the reference to the revenues of the Federation there shall be substituted a reference to the revenues of the Province:

Provided that nothing in this section shall derogate from the power of the Auditor-General of India to give such directions in respect to the accounts of Provinces as are mentioned in the next succeeding section.

See Note on Audit and Accounts above.

168. The accounts of the Federation shall be kept in such form as the Auditor-General of India may, with the approval of the Governor-General, prescribe and, in so far as the Auditor-General of India may, with the like approval, give any directions with regard to the methods or principles in accordance with which any accounts of Provinces ought to be kept, it shall be the duty of every Provincial Government to cause accounts to be kept accordingly. Power of Auditor-General of India to give directions as to accounts

The reason for conferring this power on the Auditor-General of India is thus explained by the Joint Select Committee: 'A general form of accounts framed on the common basis for all the Provinces should continue to be available for such purposes as the consideration by the Federal Government of application of loans from Provincial Governments, or proposals for the assignment of revenues to units.' [1]

169. The reports of the Auditor-General of India relating to the accounts of the Federation shall be submitted to the Governor-General, who shall cause them to be laid before the Federal Legislature, and the reports of the Auditor-General of India or of the Auditor-General Audit reports

[1] Par. 397.

of the Province, as the case may be, relating to the accounts of a Province shall be submitted to the Governor of the Province, who shall cause them to be laid before the Provincial Legislature.

Auditor of Indian Home Accounts

See NOTE ON AUDIT AND ACCOUNTS above.

170.—(1) There shall be an Auditor of Indian Home Accounts who shall be appointed by the Governor-General in his discretion and shall only be removed from office in like manner and on the like grounds as a judge of the Federal Court.

(2) The conditions of service of the Auditor of Indian Home Accounts shall be such as may be prescribed by the Governor-General in his discretion :

Provided that neither the salary of an Auditor of Indian Home Accounts nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.

(3) The Auditor of Indian Home Accounts shall perform such duties and exercise such powers in relation to transactions in the United Kingdom affecting the revenues of the Federation, of the Federal Railway Authority, or of any Province, as may be prescribed by, or by rules made under, an Order of His Majesty in Council, or by any Act of the Federal Legislature varying or extending such an Order :

Provided that no Bill or amendment for the purpose aforesaid shall be introduced or moved without the prior sanction of the Governor-General in his discretion.

(4) The reports of the Auditor of Indian Home Accounts relating to such transactions as aforesaid shall be submitted to the Auditor-General of India, or, in the case of transactions affecting the revenues of a Province which has an Auditor-General, to the Auditor-General of the Province, and shall be included by any such Auditor-General in the reports which under this Part of this Act he is required to submit to the Governor-General or, as the case may be, to the Governor.

(5) The Auditor of Indian Home Accounts shall be subject to the general superintendence of the Auditor-General of India.

(6) The salary, allowances and pension payable to or in respect of the Auditor of Indian Home Accounts shall be charged on the revenues of the Federation, and the

salaries, allowances and pensions payable to or in respect of members of his staff shall be paid out of those revenues.

(7) His Majesty in Council may require the Auditor of Indian Home Accounts to perform in relation to Burma all or any of the functions which he performs in relation to India, and may fix the payments to be made in respect of his services from the revenues of Burma to the revenues of the Federation, and may make such incidental and consequential provision as may appear to him to be proper.

Cl. (1): For the manner and grounds of removal of a Judge of the Federal Court, see s. 200(2) and notes.

Cl. (3): For the duties and powers of the Auditor of Indian Home Accounts, see the (Audit and Accounts) Order, 1936.

Audit of accounts relating to the discharge of the functions of the Crown in relation to Indian States

171. The accounts relating to the discharge of the functions of the Crown in its relations with Indian States shall be audited by the Auditor-General of India, or, in so far as those accounts concern transactions in the United Kingdom, by the Auditor of Indian Home Accounts acting on his behalf and under his general superintendence, and the Auditor-General of India shall make to the Secretary of State annual reports on the accounts so audited by him or on his behalf.

CHAPTER III

PROPERTY, CONTRACTS, LIABILITIES, AND SUITS

INTRODUCTION

The Act modifies considerably the range and the extent of the powers of the Secretary of State. The Secretary of State in Council as a body corporate by statute will cease to exist on the new constitution coming into effect, and the Council as existing immediately before the commencement of Part III of this Act, (the establishment of provincial autonomy) shall be dissolved and ' any rights, authority and jurisdiction . . . heretofore exercisable in, or in relation to, any territories in India ' by the Secretary of State or the Secretary of State in Council shall vest in the Crown. Provisions have therefore been made in this chapter for the vesting of property and liability for suits. As Sir Samuel Hoare stated in his evidence before the Joint Select Committee :

> With the institution of provincial autonomy, and the legal delimitation of the power and authority of the Provincial Governments of the future and of the Federal Government, accompanied by the disappearance of the Secretary of State in Council as a corporation with sole final authority over all Indian expenditure, it becomes necessary that the rights and obligations of the Government of India should be apportioned between the Federal and the Provincial Governments respectively, which will consequently have to be created juridic persons for the purpose of suing and being sued.

The following changes have been made by statute :

(*a*) Provisions have been made in the Act giving juristic personality to the Federal and Provincial Governments for the purpose of enabling them to sue and be sued in their own names. All legal proceedings are to be taken in future against the Federation of India or the Provincial Governments.

(*b*) In pending suits, the Secretary of State is to be substituted for the ' Secretary of State in Council '.

(*c*) Provisions have been made for the allocation of all property vested in His Majesty and under the control of the Secretary of State in Council, between the Federal and the Provincial Governments (subject to the special provision which has been made in relation to railways).

Property vested in His Majesty outside the federal and the provincial spheres will not be affected by this allocation.

(*d*) Existing powers of the Secretary of State in Council in relation to property allocated under (*c*) above, and in relation to the acquisition of property and the making of contracts for the purposes of the Federal and Provincial Governments, will be transferred to, and become powers of, the Governor-General of the Federation and the Governors of the Provinces respectively.

All contracts made under the powers so transferred will be expressed to be made by the Governor-General or the Governor as the case may be, and may be executed and made in such manner and by such persons as he may direct, but no personal liability will be incurred by any person making or executing such a contract.

(*e*) Rights and liabilities arising under statute or contract in existence at the commencement of the Act, including immunities from Indian income-tax in respect of interest on sterling loans issued or guaranteed by the Secretary of State in Council, will be maintained.

Existing liabilities of the Secretary of State in Council will be enforced after the commencement of Part III of the Act against the Secretary of State. All existing obligations under statute or contract which impose a liability on the revenues of India will remain a liability on all Indian revenues—federal or provincial.

(*f*) Statutory obligations are thrown on the Federation of India and the Provinces to place sufficient funds at the disposal of the Secretary of State to enable him to make such payments as he may have to make in respect of any liability which has to be met out of the revenues of the Federation or the Province, as the case may be.

172.—(1) All lands and buildings which immediately before the commencement of Part III of this Act were vested in His Majesty for the purposes of the government of India shall as from that date— Vesting of lands and buildings

(*a*) in the case of lands and buildings which are situate in a Province, vest in His Majesty for the purposes of the government of that Province unless they were then used, otherwise than under a tenancy agreement between the Governor-General in Council and the Government of that Province, for purposes which thereafter will be purposes of the Federal Government or of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, or unless they are lands and buildings formerly used for such purposes as aforesaid, or intended or formerly intended to be so used, and are certified by the Governor-General in Council or, as the case may be, His Majesty's Representative, to have been retained for future use for such purposes, or to have been retained temporarily for the purpose of more advantageous disposal by sale or otherwise;

(*b*) in the case of lands and buildings which are situate in a Province but do not by virtue of the preceding paragraph vest in His Majesty for the purposes of the government of that Province, and in the case of lands and buildings which are situate in India elsewhere than in a Province, vest in His Majesty for the purposes of the government

of the Federation or for the purposes of the exercise of the functions of the Crown in its relations with Indian States, according to the purpose for which they were used immediately before the commencement of Part III of this Act; and

(c) in the case of lands and buildings which are situate elsewhere than in India (except lands and buildings situate in Burma or Aden), vest in His Majesty for the purposes of the government of the Federation or, if they were immediately before the commencement of Part III of this Act used for purposes of the department of the Secretary of State in Council, for the purposes of His Majesty's Government in the United Kingdom.

(2) Except with the consent of the Governor-General, effect shall not be given to any proposal for the sale of any lands or buildings which by virtue of this section are vested in His Majesty for the purposes of His Majesty's Government in the United Kingdom, or to any proposal for the diversion of any such lands and buildings to uses not connected with the discharge of the functions of the Crown in relation to India or Burma.

(3) The lands and buildings vested in His Majesty by virtue of this section for the purpose of His Majesty's Government in the United Kingdom shall be under the management of the Commissioners of Works, and, subject to the provisions of subsection (2) of this section, the provisions of the Acts relating to the Commissioners of Works shall apply in relation to those lands and buildings as if they had been acquired by the Commissioners in pursuance of those Acts.

(4) The provisions of this section shall apply in relation to the contents of buildings vested in His Majesty for the purposes of His Majesty's Government in the United Kingdom, other than any money or securities, as they apply in relation to the buildings themselves:

Provided that, in the case of such articles and classes of articles as may be agreed upon between the Secretary of State and the Governor-General, the provisions of subsection (2) of this section shall not apply and, notwithstanding anything in subsection (3) of this section, the contents of those buildings shall be under the control of the Secretary of State.

(5) Any question which may arise within the five years next following the commencement of Part III of this Act as to the purposes for which any lands or buildings are by virtue of this section vested in His Majesty may be determined by His Majesty in Council.

Before Part III of the Act comes into force, all public property is vested in His Majesty for the purposes of the Government of India. After provincial autonomy, such property will be divided between the Federation on the one hand and the Provinces on the other. Public land and buildings situated in a Province will now be vested in His Majesty for the purposes of the Government of that Province, unless they were formerly used for purposes of the central Government or for purposes which will subsequently to the introduction of Part II of the Act, be the purposes of the Federal Government or of the Viceroy. Such land and buildings will vest in His Majesty for the purposes of the Province or for the purposes of the Federation or for the purposes of the Crown in its relations with the States. Any question which may within five years after the establishment of provincial autonomy arise as to purposes for which lands or buildings were held by His Majesty—whether for the Province or the Federation or the Crown in Council,—may be determined by His Majesty. S. 175(2) provides that all property acquired for the purposes of the Federation or of a Province or of the Crown in its relations with the States, shall vest in His Majesty for these purposes. As to property falling to His Majesty as *bona vacantia*, etc. and the division *thereof between the Federation and a Province, see s. 174 and notes to* s. 2 under PREROGATIVE POWER : ESCHEAT.

Under Cl. (1) (*a*) of this section, certificate has been given by His Majesty's representative by Notif. No. 2—Fed-II, in the Gazette of India Extraordinary, April 1, 1937.

173.—(1) Subject to the provisions of this and the last preceding section, all property vested in His Majesty which by virtue of any delegation from the Secretary of State in Council or otherwise is immediately before the commencement of Part III of this Act in the possession or under the control of, or held on account of, the Governor-General in Council or any Local Government shall, as from the commencement of Part III of this Act, vest in His Majesty— Provisions as to other property

(*a*) for the purposes of the Government of the Federation ; or

(*b*) for the purposes of the exercise of the functions of the Crown in its relations with Indian States ; or

(*c*) for the purposes of the Government of a Province,

according as the purposes for which the property was held immediately before the commencement of Part III of this Act will thereafter be purposes of the Government

of the Federation, purposes of His Majesty's Representative for the exercise of the said functions of the Crown or purposes of the Government of a Province :

Provided that—

(i) all moneys which immediately before the commencement of Part III of this Act were in the public account of which the Governor-General in Council was custodian shall be vested in His Majesty for the purposes of the Government of the Federation ;

(ii) all credits and debits of the Local Government of any Governor's Province (other than Burma) in account with the Governor- General in Council shall be deemed to be credits and debits of the corresponding Province under this Act in account with the Federation.

(2) Subject as aforesaid, all other property vested in His Majesty and under the control of the Secretary of State in Council immediately before the commencement of Part III of this Act shall as from the commencement of Part III of this Act vest in His Majesty for the purposes of the Government of the Federation, for the purposes of the exercise of the functions of the Crown in its relations with Indian States or for the purposes of the Government of a Province, according as the Secretary of State may determine having regard to the circumstances of the case, and the Secretary of State shall have power to and shall deal with the property accordingly.

(3) In this section 'property' includes money, securities, bank balances and movable property of any description.

(4) Arrears of any taxes outstanding immediately before the commencement of Part III of this Act shall be deemed to be due to and may be recovered by the Federal Government or a Provincial Government according as the proceeds of any such tax imposed after the commencement of Part III of this Act would be due to and recoverable by the Federal Government or the Provincial Government.

(5) This section shall apply in relation to any equipment, stores, moneys, bank balances and other property held in connection with His Majesty's Indian forces stationed in Burma (not being forces raised in Burma) as it applies in relation to property held for purposes which will be purposes of the Government of the Federation, but, save as aforesaid, nothing in this section applies

to any property situate in Burma or Aden, or to arrears of taxes in Burma or Aden, or to any property which by virtue of any delegation from the Secretary of State in Council or otherwise is, immediately before the commencement of Part III of this Act, in the possession or under the control of, or held on account of, the Local Government of Burma or Aden.

(6) Nothing in this section shall effect any adjustments made or to be made by or under this Act by reason of the creation before the commencement of Part III of this Act of the Provinces of Orissa and Sind.

This section provides for the distribution of properties vested in His Majesty which, at the date of the establishment of the provincial autonomy, were in possession or under the control of various authorities in India by delegation from the Secretary of State in Council. Such properties will vest in His Majesty for the benefit of (1) the Federation; (2) a Province or (3) the Crown in the exercise of its relation with the States. Power is given to the Secretary of State to distribute the properties in accordance with the provisions of the Act.

Property vested in His Majesty for the purpose of the Government of India, which were not, before the commencement of Part III of the Act held by, or on account of the Federation and the Provinces, will not be affected by the allocation provided for in this and the preceding sections. Although provision has been made for transferring all property vested in the Crown, whether it is situate in British India or in the Indian States, such rights of the Crown in the States as accrued by exercise of the rights of paramountcy, will not be affected by the Act. The jurisdiction, for instance, which the Government of India now exercise over State railways, has been acquired by the Crown through a series of treaties, i.e. by the exercise of the rights of Paramountcy, and will not be transferred to the Federal Government. Sir Samuel Hoare stated that if a State refused to accept the transfer of jurisdiction to the Federation, under this section, it is open to the Crown to refuse the accession of the State into the Federation.

Notwithstanding anything in s. 173, the Road Development Fund and the Fund for the Economic Development and Improvement of Rural Areas remaining with the Governor-General in Council before the commencement of Part III, shall continue to be so held for the same purposes. See the India and Burma (Transitory Provisions) Order, 1937, paragraph 5.

Property accruing by escheat or lapse, or as bona vacantia

174. Subject as hereinafter provided, any property in India accruing to His Majesty by escheat or lapse, or as bona vacantia for want of a rightful owner, shall, if it is property situate in a Province, vest in His Majesty for the purposes of the Government of that Province, and shall in any other case vest in His Majesty for the purposes of the government of the Federation:

Provided that any property which at the date when it accrued to His Majesty was in the possession or under

the control of the Federal Government or the Government of a Province shall, according as the purposes for which it was then used or held were purposes of the Federation or of a Province, vest in His Majesty for the purposes of the government of the Federation or for the purposes of the government of that Province.

See notes to s. 2 under PREROGATIVE POWERS : ESCHEAT. If such property is situated in a Province, it will vest in His Majesty for the purposes of that Province.

Power to acquire property and to make contracts, etc.

175.—(1) The executive authority of the Federation and of a Province shall extend, subject to any Act of the appropriate Legislature, to the grant, sale, disposition or mortgage of any property vested in His Majesty for the purposes of the government of the Federaton or of the Province, as the case may be, and to the purchase or acquisition of property on behalf of His Majesty for those purposes respectively, and to the making of contracts :

Provided that any land or building used as an official residence of the Governor-General or a Governor shall not be sold, nor any change made in the purposes for which it is being used, except with the concurrence, in his discretion, of the Governor-General or the Governor, as the case may be.

(2) All property acquired for the purposes of the Federation or of a Province or of the exercise of the functions of the Crown in its relations with Indian States, as the case may be, shall vest in His Majesty for those purposes.

(3) Subject to the provisions of this Act with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise.

(4) Neither the Governor-General, or the Governor of a Province, nor the Secretary of State shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Act, or for the purposes of the Government of India Act or of any Act repealed thereby, nor shall any person making or executing any such

contract or assurance on behalf of any of them be personally liable in respect thereof.

The Federal Government has control over property belonging to the Federation. Under s. 162, it can borrow money on the security of the revenues of the Federation. Under this section it can sell, mortgage or otherwise dispose of such property. But the sale of any land or building used as official residence by the Governor-General or any change in its use requires his consent given in his discretion. Similarly in the case of property belonging to the Provinces.

Federal Railway Authority: See Part VIII of the Act and s. 185 in particular for power to acquire, or dispose of, land.

See notes to s. 176. Under s. 29(2) of the old Act, contracts made for the purposes of that Act were expressed to be made by the Secretary of State in Council. But the latter body is dissolved by this Act, and contracts for the purposes of this Act are to be made by the Governor-General or by the Governor of a Province as the case may be.[1] It is further provided in subsection (4) that neither the Governor-General nor a Governor nor the Secretary of State (nor any person acting on their behalf) shall be personally liable in respect of any contract made or executed for the purposes of this Act or any other Act relating to the Government of India or of any Province. The provision as to exemption of personal liability on contracts is a statutory recognition of the common law rule. At common law, officers of the Crown are in the same position as any other agent who acts on behalf of a disclosed principal. Regarding exemption from liability of the Secretary of State, etc., see s. 306.

176.—(1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed. Suits and proceedings

(2) Rules of court may provide that, where the Federation, the Federal Railway Authority, or a Province sue or are sued in the United Kingdom, service of all proceedings may be effected upon the High Commissioner for India or such other representative in the United Kingdom of the Federation, Authority or Province, as may be specified in the rules.

Provision is made in this section for giving a juristic personality to the Federal and Provincial Governments for the purpose of enabling them in future to sue and be sued in their own names.

[1] See ss. 161–63.

No suit would, however, lie in respect of acts of state or acts of sovereignty:[1] An act of sovereignty is an act of the Government in exercise of its sovereign power, and no liability is incurred for such acts.[2]

This section is subject to s. 179(1) which provides that where a cause of action arose before the commencement of Part III of the Act, and the suit might have been brought against the Secretary of State in Council, the plaintiff may proceed against the Federation of India or the Province according to the subject matter of the proceedings or at his option against the Secretary of State.

Existing contracts of Secretary of State in Council

177.—(1) Without prejudice to the special provisions of the next succeeding section relating to loans, guarantees and other financial obligations, any contract made before the commencement of Part III of this Act by, or on behalf of, the Secretary of State in Council shall, as from that date—

(*a*) if it was made for purposes which will after the commencement of Part III of this Act be purposes of the Government of a Province, have effect as if it had been made on behalf of that Province; and

(*b*) in any other case have effect as if it had been made on behalf of the Federation,

and references in any such contract to the Secretary of State in Council shall be construed accordingly and any such contract may be enforced in accordance with the provisions of the next but one succeeding section.

(2) This section does not apply in relation to contracts solely in connection with the affairs of Burma or Aden, or solely for purposes which will after the commencement of Part III of this Act be purposes of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States.

This section provides for existing contracts made by or on behalf of the Secretary of State in Council, for the Government of India or a local Government before the commencement of Part III of the Act.

Special provisions as to existing loans, guarantees and other financial obligations

178.—(1) All liabilities in respect of such loans, guarantees and other financial obligations of the Secretary of State in Council as are outstanding immediately before the commencement of Part III of this Act were secured on the revenues of India shall, as from that date, be liabilities

[1] *Salaman* v. *Secretary of State* [1906] I.K.B. 613.

[2] *Mataprosad* v. *Secretary of State for India* (1930) 5 Luck. 157: *Ross* v. *Secretary of State for India* (1914) 37 Mad. 55. See Part X, Chapter V, note on RULE OF LAW AND ACT OF STATE.

of the Federation and shall be secured upon the revenues of the Federation and of all the Provinces.

(2) All enactments relating to any such loans, guarantees and other financial obligations of the Secretary of State in Council as aforesaid shall, in relation to those loans, guarantees and obligations, continue to have effect with the substitution therein, except in so far as the context otherwise requires, of references to the Secretary of State for references to the Secretary of State in Council, and with such other modifications and such adaptations as His Majesty in Council may deem necessary.

(3) No deduction in respect of taxation imposed by or under any existing Indian law or any law of the Federal or a Provincial Legislature shall be made from any payment of principal or interest in respect of any securities, the interest whereon is payable in sterling, being a payment which would, but for the provisions of this Act, have fallen to be made by the Secretary of State in Council.

(4) If in the case of any Local Government in India there are outstanding immediately before the commencement of Part III of this Act any loans or other financial obligations secured upon the revenues of the Province, all liabilities in respect of those loans and obligations shall, as from that date, be liabilities of the Government of, and shall be secured upon the revenues of, the corresponding Province under this Act.

(5) Any liabilities in respect of any such loan, guarantee or financial obligation as is mentioned in this section may be enforced in accordance with the provisions of the next succeeding section.

(6) The provisions of this section apply to the liabilities of the Secretary of State in Council in respect of the Burma Railways three per cent. Debenture Stock, but, save as aforesaid, do not apply to any liability solely in connection with the affairs of Burma or Aden.

This section maintains the existing liabilities, including existing immunities from Indian income-tax, in respect of interest or sterling loans issued or guaranteed by the Secretary of State in Council.

See the Government of India (Adaptation of Acts of Parliament) Order, 1937, for substitutions, modifications, and adaptations in enactments relating to loans, guarantees and other financial obligations of the Secretary of State in Council, made under s. 178(2).

179.—(1) Any proceedings which, if this Act had not been passed, might have been brought against the Secretary of State in Council may, in the case of any liability arising

Legal proceedings as to certain matters

before the commencement of Part III of this Act or arising under any contract or statute made or passed before that date, be brought against the Federation or a Province, according to the subject-matter of the proceedings, or, at the option of the person by whom the proceedings are brought, against the Secretary of State, and any sum ordered to be paid by way of debt, damages or costs in any such proceedings, and any costs, or expenses incurred in or in connection with the defence thereof, shall be paid out of the revenues of the Federation or the Province, as the case may be, or, if the proceedings are brought against the Secretary of State, out of such revenues as the Secretary of State may direct.

The provisions of this subsection shall apply with respect to proceedings arising under any contract declared by the terms thereof to be supplemental to any such contract as is mentioned in those provisions as they apply in relation to the contracts so mentioned.

(2) If at the commencement of Part III of this Act any legal proceedings are pending in the United Kingdom or in India to which the Secretary of State in Council is a party, the Secretary of State shall be deemed to be substituted in those proceedings for the Secretary of State in Council, and the provisions of subsection (1) of this section shall apply in relation to sums ordered to be paid, and costs or expenses incurred, by the Secretary of State or the Secretary of State in Council in or in connection with any such proceedings as they apply in relation to sums ordered to be paid in, and costs or expenses incurred in or in connection with the defence of, proceedings brought against the Secretary of State under the said subsection (1).

(3) Any contract made in respect of the affairs of the Federation or a Province by or on behalf of the Secretary of State after the commencement of Part III of this Act may provide that any proceedings under that contract shall be brought in the United Kingdom by or against the Secretary of State and any such proceedings may be brought accordingly, and any sum ordered to be paid by the Secretary of State by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred by the Secretary of State in or in connection therewith, shall be paid out of the revenues of the Federation or the Province, as the case may be.

(4) Nothing in this section shall be construed as imposing any liability upon the Exchequer of the United Kingdom in respect of any debt, damages, costs, or expenses

in or in connection with any proceedings brought or continued by or against the Secretary of State by virtue of this section, or as derogating from the provisions of subsection (1) of the last preceding section.

(5) This section does not apply in relation to contracts or liabilities solely in connection with the affairs of Burma or Aden, other than liabilities which are by this Act made liabilities of the Federation, or to contracts or liabilities for purposes which will, after the commencement of Part III of this Act, be purposes of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States.

See notes to s. 176.

Contracts in connection with functions of Crown in its relations with Indian States

180.—(1) *Any contract made before the commencement* of Part III of this Act by or on behalf of the Secretary of State in Council solely in connection with the exercise of the functions of the Crown in its relations with Indian States shall, as from the commencement of Part III of this Act, have effect as if it had been made on behalf of His Majesty and references in any such contract to the Secretary of State in Council shall be construed accordingly.

(2) Any proceedings which if this Act had not been passed might have been brought by or against the Secretary of State in Council in respect of any such contract as aforesaid may be brought by or against the Secretary of State and if at the commencement of Part III of this Act any proceedings in respect of any such contract are pending in the United Kingdom or in India to which the Secretary of State in Council is a party, the Secretary of State shall be deemed to be substituted in those proceedings for the Secretary of State in Council.

(3) Any contract made after the commencement of Part III of this Act on behalf of His Majesty solely in connection with the exercise of the said functions of the Crown shall, if it is such a contract as would have been legally enforceable by or against the Secretary of State in Council, be legally enforceable by or against the Secretary of State.

(4) Any sums ordered to be paid by the Secretary of State by way of debt, damages or costs in any such proceedings as are mentioned in this section and any costs or expenses incurred by him in or in connection with the prosecution or defence thereof shall be deemed to be sums required for the discharge of the functions of the Crown

in its relations with Indian States, and any sum received by the Secretary of State by virtue of any such proceedings shall be paid or credited to the Federation.

See Introduction to this Chapter. S. 2 Prov. refers to the powers connected with the exercise of the functions of the Crown in its relations with Indian States which may be exercised on behalf of His Majesty by His Majesty's Representative or by his authorized agent. See notes to s. 2, under PREROGATIVE POWERS: PARAMOUNTCY. This section refers to contracts made in connexion with such functions. Before the commencement of Part III of this Act, such contracts would be made by the Secretary of State in Council and in suits or other proceedings thereon, whether pending at the commencement of Part III or filed subsequently, the Secretary of State is to be substituted as defendant in place of the Secretary of State in Council. Sums payable by the Secretary of State in such proceedings and costs and expenses incurred by him in connexion therewith are regarded as sums required by His Majesty for the discharge of the functions of the Crown in its relations with Indian States and they are charged on the revenues of the Federation.[1] Nothing in this Act affects the rights and obligations of the Crown in relation to Indian States.[2] Every year such sums shall be paid to His Majesty for the exercise of the functions of the Crown in its relations to the States, as may be required by the Viceroy.[3]

[1] See s. 33(3) (f).
[2] See s. 285.
[3] See s. 145.

PART VIII

THE FEDERAL RAILWAY AUTHORITY

PART VIII

THE FEDERAL RAILWAY AUTHORITY

INTRODUCTION

This part deals with the arrangements to be made for the administration of railways under the Federal Government. While the Federal Government and Legislature will exercise a general control over railway policy, the actual control of the administration of the State railways in India (including those worked by companies) has been placed by the Act in the hands of a statutory body, called the Federal Railway Authority, so composed and with such powers as will ensure that it is in a position to perform its duties upon business principles and without being subject to political interference.

The Joint Parliamentary Committee in paragraph 393 of their Report refer to the Report of a Committee appointed by the Secretary of State in June 1933 to make sketch proposals for the future administration of Indian railways; and they say that that Committee's scheme provides a suitable basis for such administration; but on two points the Joint Parliamentary Committee lay stress: (1) the importance of the suggestion that at least three out of the seven members of the proposed Railway Authority should be appointed by the Governor-General in his discretion; and (2) the Authority should not be constituted on a communal basis. The Joint Parliamentary Committee were of opinion that the Constitution Act should lay down the governing principles upon which this important piece of administrative machinery should be based and then there is to be federal legislation conforming to those principles passed.

Amendment of Part VIII of this Act by Federal Legislature

As explained towards the end of paragraph 393 of the Report of the Joint Parliamentary Committee, this Act lays down the governing principles, and the Federal Legislature in passing subsequent legislation on the matter should conform to those principles. The Federal or the Provincial Legislature can, under the proviso to s. 181(2) make laws regarding the regulation, construction, maintenance and operation of railways which shall be binding on the Railway Authority. Under s. 182(2), the provisions of the Eighth Schedule may be amended by the Federal Legislature, except as regards s. 182(1), by a Bill introduced and moved with the previous sanction of the Governor-General at his discretion. Under s. 185(2), the Federal Legislature may make provisions regarding suits by or against the Federal Railway Authority.

Appointments to the Railway Service

Under s. 242(1), appointments to the railway services of the Federation are to be made by the Authority who need not avail themselves of the services of the Federal Public Service Commission (except as regards the framing of rules for regulating recruitment). The claim of Anglo-Indians to appointments is safeguarded by s. 242(2).

The Act regulates the following matters:

(*a*) The extent and control of the Federal Government and the Federal Legislature over the Railway Authority.[1]

[1] S. 182 and the Eighth Schedule.

(*b*) The constitution of the Railway Authority.

(*c*) The special responsibilities of the Governor-General in relation to the operations of the Authority.[1]

(*d*) The directions and principles to be observed by the Authority.[2]

(*e*) The conditions for the separation of railway finances from general finances.[3]

(*f*) The continuance in full force of the contracts at present existing with the Indian railway companies, and the security of the payments periodically due to them in respect of guaranteed interest, share of earnings and surplus profits and as well as their right in accordance with their contracts to have access to the Secretary of State in regard to disputed points and if they so desire, to proceed to arbitration.[4]

(*g*) Machinery for arbitration proceedings on disputed issues in the sphere of railway administration.[5]

(*h*) Legislation affecting the constitution or powers of the Railway Authority.[6]

Executive authority in respect of railways to be exercised by Federal Railway Authority

181.—(1) The executive authority of the Federation in respect of the regulation and the construction, maintenance and operation of railways shall be exercised by a Federal Railway Authority (hereinafter referred to as 'the Authority').

(2) The said executive authority extends to the carrying on in connection with any Federal railways of such undertakings as, in the opinion of the Authority, it is expedient should be carried on in connection therewith and to the making and carrying into effect of arrangements with other persons for the carrying on by those persons of such undertakings:

Provided that, as respects their powers under this subsection, the Authority shall be subject to any relevant provisions of any Federal, Provincial or existing Indian law, and to the relevant provisions of the law of any Federated State, but nothing in this subsection shall be construed as limiting the provisions of Part VI of this Act regulating the relations of the Federation with Provinces and States.

(3) Notwithstanding anything in this section, the Federal Government or its officers shall perform in regard to the construction, equipment and operation of railways such functions for securing the safety both of members of the public and of persons operating the railways, including the holding of inquiries into the causes of accidents, as in the opinion of the Federal Government should be performed by persons independent of the Authority and of any railway administration.

[1] S. 183(4).
[2] S. 183.
[3] Ss. 186–89.
[4] See ss. 186, 187, 197.
[5] S. 197.
[6] S. 182(2) and 185(2).

So much of Part X of this Act as provides that powers in relation to railway services of the Federation shall be exercised by the Authority shall not apply in relation to officers of the Federal Government employed in the performance of any of the functions mentioned in this subsection.

See W.P.Intr. 74; J.C.R. 392–93. The executive authority of the Federation in respect of the railways is to be exercised by the Federal Railway Authority. Hitherto the Government of India have been directly responsible for the administration of the railways in India but the Act creates a statutory body, called the Federal Railway Authority to which has been entrusted the administration of railways. It will exercise its powers through an executive constituted under the provisions of the Eighth Schedule.[1]

The Eighth Schedule provides for the constitution of the Railway Authority and the qualifications of persons who are eligible for appointment as members of the Authority. Under s. 182(2), it may be amended by the Federal Legislature by an Act introduced with the previous sanction of the Governor-General. But the provision in s. 182(1) that the Governor-General can appoint not less than three-sevenths of the members of the Authority and also the President, cannot be amended.

Cl. (3): In paragraph 11 of the Report of the Committee appointed by the Secretary of State in June, 1933, (which sat in London) to make sketch proposals for the future administration of Indian Railways (printed as Appendix (IV) to paragraph 392–95 of the Report of the Joint Parliamentary Committee)—referred to hereinafter as the London Committee, it was suggested that the Federal Government is to lay down regulations for the safety of all the Indian railways and one of the departments of the Federal Government, other than that responsible for transport and communications, is to be responsible for the enforcement of such regulations.

S. 242 deals with appointments to the railway services by the Authority and makes certain provisions for safeguarding the interest of the Anglo-Indian community in the matter of appointments and pay. By the India and Burma (Transitory Provisions) Order, 1937, s. 181(2) shall, notwithstanding paragraph 3(2) of the Government of India (Commencement and Transitory Provisions) Order, 1936, come into force on the commencement of Part III of the Act; the Authority, until the establishment of the Federal Railway Authority, being the Governor-General in Council.

Composition, etc. of Railway Authority

182.—(1) Not less than three-sevenths of the members of the Authority shall be persons appointed by the Governor-General in his discretion, and the Governor-General shall in his discretion appoint a member of the Authority to be the President thereof.

(2) Subject as aforesaid, the provisions of the English Schedule to this Act, as supplemented or amended by any Act of the Federal Legislature for the time being in force, shall have effect with respect to the appointment, quali-

[1] See Rules 11 and 12 of the Eighth Schedule.

fications and conditions of service of members of the Authority, and with respect to the Authority's proceedings, executive staff and liability to income-tax:

Provided that, except with the previous sanction of the Governor-General in his discretion, there shall not be introduced into, or moved in, either Chamber of the Federal Legislature any Bill or any amendment for supplementing or amending the provisions of the said Schedule.

The Federal Railway Authority is to consist of at least seven members, of whom not less than three are to be appointed by the Governor-General in his discretion. The remaining members shall be appointed by the Governor-General on the advice of the Federal Government.

See s. 2 of the Eighth Schedule for the qualification of persons who may be appointed members of the Authority. It is to be noted that the provisions of this Schedule may be amended by the Federal Legislature but the proviso states that Bills or amendments affecting those provisions cannot be introduced into the Federal Legislature except with the previous sanction of the Governor-General in his discretion.[1] The provisions of s. 182(1) cannot be altered by any amendment of the Eighth Schedule.

Directions and principles to be observed by Railway Authority

183.—(1) The Authority in discharging their functions under this Act shall act on business principles, due regard being had by them to the interests of agriculture, industry, commerce and the general public, and in particular shall make proper provision for meeting out of their receipts on revenue account all expenditure to which such receipts are applicable under the provisions of this Part of this Act.

(2) In the discharge of their said functions the Authority shall be guided by such instructions on questions of policy as may be given to them by the Federal Government.

If any dispute arises under this subsection between the Federal Government and the Authority as to whether a question is or is not a question of policy, the decision of the Governor-General in his discretion shall be final.

(3) The provisions of subsection (1) of this section shall apply in relation to the discharge by the Federal Government of their functions with respect to railways as they apply in relation to the functions of the Authority, but nothing in this subsection shall be construed as limiting the powers of the Governor-General under the next succeeding subsection.

(4) The provisions of this Act relating to the special responsibilities of the Governor-General, and to his duty as regards certain matters to exercise his functions in his

[1] See s. 108(3).

discretion or to exercise his individual judgment, shall apply as regards matters entrusted to the Authority as if the executive authority of the Federation in regard to those matters were vested in him, and as if the functions of the Authority as regards those matters were the functions of ministers, and the Governor-General may issue to the Authority such directions as he may deem necessary as regards any matter which appears to him to involve any of his special responsibilities, or as regards which he is by or under this Act required to act in his discretion or to exercise his individual judgment, and the Authority shall give effect to any directions so issued to them.

In exercising the control vested in them, the Railway Authority as well as the Federal Government will be guided by business principles due regard being paid to the interests of agriculture, industry and the general public and to defence requirements. See paragraph 5 of the London Committee's proposals.

The Federal Government and the Legislature will exercise a general control over railway policy, but will not be concerned with the actual administration of the railways which has been entrusted to the Authority.

Cl. (4): The powers which the Governor-General possesses of taking action in virtue of his special responsibilities (including those relating to matters affecting the reserved departments) under the provisions of s. 12, extend to the giving of directions to the Railway Authority, independently of the Federal Minister in charge of railways. Also his right, in the event of the breakdown of the constitution under the provisions of s. 45, to assume to himself the powers vested in any Federal Authority extends to the powers vested in the Authority. The chief executive officer of the Authority is required to bring to the notice of the Governor-General any matter under consideration by the Authority or by him which are likely to involve any special responsibility of the Governor-General.[1]

Conduct of business between Railway Authority and Federal Government

184.—(1) The Governor-General exercising his individual judgment, but after consultation with the Authority, may make rules for the more convenient transaction of business arising out of the relations between the Federal Government and the Authority.

(2) The rules shall include provisions requiring the Authority to transmit to the Federal Government all such information with respect to their business as may be specified in the rules, or as the Governor-General may otherwise require to be so transmitted, and in particular provisions requiring the Authority and their chief executive officer to bring to the notice of the Governor-General any matter under consideration by the Authority or by that

[1] See s. 184(2).

officer which involves, or appears to them or him likely to involve, any special responsibility of the Governor-General.

The Act does not specify details relating to the transaction of business between the Federal Government and the Railway Authority. The Railway Board Committee which consisted of certain members of the central Legislature, in July 1933, made the following recommendations, which are likely to be embodied in rules:

(*a*) Revenue estimates are to be presented annually to the Federal Government which will submit the same to the Federal Legislature. These estimates will not be submitted to the vote of the Legislature. But if a contribution is required from the general revenues, a vote will be required.

(*b*) The programme of capital expenditure will be submitted to the Federal Government for approval by the Federal Legislature. The Federal Government may authorize the Railway Authority to incur capital expenditure subject to conditions to be prescribed.

(*c*) The Federal Minister responsible for transport and communications may, at any time, convene a special meeting of the Railway Authority for the purpose of discussing matters of policy. He will preside over such meetings. At other meetings of the Railway Authority, the Federal Government will have the right to depute a person to attend and speak but not to vote.

Acquisition and sale of land, contracts and working agreements

185.—(1) Except in such classes of case as may be specified in regulations to be made by the Federal Government, the Authority shall not acquire or dispose of any land, and, when it is necessary for the Authority to acquire compulsorily any land for the purposes of their functions, the Federal Government shall cause that land to be acquired on their behalf and at their expense.

(2) Contracts made by or on behalf of the Authority shall be enforceable by or against the Authority and not by or against the Federation, and, subject to any provision which may hereafter be made by Act of the Federal Legislature, the Authority may sue and be sued in the like manner and in the like cases as a company operating a railway may sue and be sued:

Provided that this subsection does not apply in relation to any contract declared by its terms to be supplemental to a contract made before the establishment of the Authority, and any such supplemental contract may be enforced in any manner in which the principal contract may be enforced.

(3) The Authority may make working agreements with, and carry out working agreements made with, any Indian State or person owning or operating any railway in India, or in territories adjacent to India, with respect to the persons by whom and the terms on which any of

the railways with which the parties are respectively concerned shall be operated.

Cl. (2): The Federal Legislature may provide as to the manner in which the Authority may sue or be sued.

186.—(1) The Authority shall establish, maintain and control a fund (which shall be known as the 'Railway Fund') and all moneys received by the Authority, whether on revenue account or on capital account, in the discharge of their functions and all moneys provided, whether on revenue account or on capital account, out of the revenues of the Federation to enable them to discharge those functions shall be paid into that Fund, and all expenditure, whether on revenue account or on capital account, required for the discharge of their functions shall be defrayed out of that Fund: Finance of the Railway Authority

Provided that nothing in this subsection shall prevent the Authority from establishing and maintaining separate provident funds for the benefit of persons who are or have been employed in connection with railways.

(2) The receipts of the Authority on revenue account in any financial year shall be applied in—

(*a*) defraying working expenses;
(*b*) meeting payments due under contracts or agreements to railway undertakings;
(*c*) paying pensions, and contributions to provident funds;
(*d*) repaying to the revenues of the Federation so much of any pensions and contributions to provident funds charged by this Act on those revenues as is attributable to service on railways in India;
(*e*) making due provision for maintenance, renewals, improvements and depreciation;
(*f*) making to the revenues of the Federation any payments by way of interest which they are required by this Part of this Act to make; and
(*g*) defraying other expenses properly chargeable against revenue in that year.

(3) Any surpluses on revenue account shown in the accounts of the Authority shall be apportioned between the Federation and the Authority in accordance with

a scheme to be prepared, and from time to time reviewed, by the Federal Government, or, until such a scheme has been prepared, in accordance with the principles which immediately before the establishment of the Authority regulated the application of surpluses in railway accounts, and any sum apportioned to the Federation under this subsection shall be transferred accordingly and shall form part of the revenues of the Federation.

(4) The Federation may provide any moneys, whether on revenue account or capital account, for the purposes of the Railway Authority, but, where any moneys are so provided, the provision thereof shall be deemed to be expenditure and shall accordingly be shown as such in the estimates of expenditure laid before the Chambers of the Legislature.

After meeting from receipts the necessary working expenses (including provisions for maintenance, renewals, depreciation, bonus and interest Provident Funds, interest on capital and other fixed charges, under contracts or agreements) the surplus will be apportioned from time to time between the Authority and the Federal Government under a scheme to be prepared by the Federal Government, and pending any new scheme, the disposal of any surplus will be governed by the arrangements in force at the time the Authority is established.[1]

Estimates of expenditure of the Authority will not be laid before the Chambers of the Legislature or be subject to the vote of the Federal Legislature but if the estimates disclose the need for a contribution from general revenues, a vote of the Legislature will, of course, be required.[2] Clause (4) specifically says that the moneys provided by the Federation for the Railway Authority are to be shown as expenditure in the estimates of expenditure submitted to the Federal Legislature.

Provisions as to certain obligations of the Railway Authority

187.—(1) There shall be deemed to be owing from the Authority to the Federation such sum as may be agreed or, in default of agreement, determined by the Governor-General in his discretion, to be equivalent to the amount of the moneys provided, whether before or after the passing of this Act, out of the revenues of India or of the Federation for capital purposes in connection with railways in India (exclusive of Burma) and the Authority shall out of their receipts on revenue account pay to the Federation interest on that amount at such rate as may be so agreed or determined, and also make payments in reduction of the principal of that amount in accordance with a repayment scheme so agreed or determined.

[1] See the London Committee Report, paragraph 5.
[2] London Committee Report, paragraph 7.

For the purposes of this subsection, where the Secretary of State in Council has assumed or incurred any obligation in connection with any such railways, he shall be deemed to have provided for the said purposes an amount equal to the capital value of that obligation as shown in the accounts of the Government of India immediately before the establishment of the Authority.

Nothing in this subsection shall be construed as preventing the Authority from making payments to the Federation in reduction of the principal of any such amount as aforesaid out of moneys other than receipts on revenue account.

(2) It shall be an obligation of the Authority to repay to the Federation any sums defrayed out of the revenues of the Federation in respect of any debt, damages, costs, or expenses in, or in connection with, any proceedings brought or continued by or against the Federation or against the Secretary of State under Part VII of this Act in respect of railways in India.

(3) It shall be an obligation of the Authority to pay to any Province or Indian State such sums as may be equivalent to the expenses incurred by that Province or State in the provision of police required for the maintenance of order on federal railway premises and any question which may arise between the Authority and a Province or State as to the amount of any expenses so incurred shall be determined by the Governor-General in his discretion.

Cl. (3): As pointed out in J.C.R. 239, Railway Police under the previous constitution was a provincial subject, but the central Government retained the power to determine the conditions as regards limit of jurisdiction and contribution by the railway to the cost of maintenance. The question of allocation of the cost of the Railway Police between the Provincial Government on the one hand and the railways on the other, was a subject of controversy. Under the constitution, Railway Police remains a provincial subject. The administration of railways has been transferred to the Authority which is to pay the Provinces or State the cost of Police required for the maintenance of order on federal railway premises. Any dispute on this point will be settled by the Governor-General in his discretion.

Investment of funds of Railway Authority

188. Subject to such conditions, if any, as may be prescribed by the Federal Government, the Authority may from time to time invest any moneys in the railway fund or any provident fund which are not for the time being required to meet expenses properly defrayable out

of that fund, and may, subject as aforesaid, from time to time transfer and realise investments made by them.

Special provisions as to certain existing funds

189.—(1) Nothing in the foregoing provisions of this Part of this Act shall be construed as entitling the Authority to require that any moneys which immediately before the establishment of the Authority were held by the Governor-General in Council on account of any railway depreciation fund, reserve fund or provident fund shall be transferred to the Authority for investment by them, but the Authority may from time to time require the transfer to themselves of so much of any such fund as they require to defray expenditure chargeable against that fund, and the Federal Government shall credit each such fund with interest on the untransferred balance thereof at such rate as may be agreed, or, in default of agreement, determined by the Governor-General in his discretion.

(2) In this section references to any such fund as aforesaid shall be construed as references to so much of that fund as is not attributable to the railways of Burma.

Audit and annual reports

190.—(1) The accounts of the receipts and expenditure of the Authority shall be audited and certified by, or on behalf of, the Auditor-General of India.

(2) The Authority shall publish annually a report of their operations during the preceding year and a statement of accounts in a form approved by the Auditor-General.

For the appointment, powers and duties of the Auditor-General, see s. 166.

Railway Rates Committee

191. The Governor-General may from time to time appoint a Railway Rates Committee to give advice to the Authority in connection with any dispute between persons using, or desiring to use, a railway and the Authority as to rates or traffic facilities which he may require the Authority to refer to the committee.

Maxima and minima rates and fares are to be fixed by the Authority subject to control by the Federal Government, or, as provided in s. 192, by the Federal Legislature. Any person having a complaint against a railway administration under the control of the Authority which was formerly referred to the Railway Rates Advisory Committee, may now have the matter referred to the Railway Rates Committee appointed by the Governor-General.

192. A Bill or amendment making provision for regulating the rates or fares to be charged on any railway shall not be introduced or moved in either Chamber of the Federal Legislature except on the recommendation of the Governor-General.

Bills and amendments for regulating rates and fares to require recommendation of Governor-General

See s. 108(3).

193.—(1) It shall be the duty of the Authority and every Federated State so to exercise their powers in relation to the railways with which they are respectively concerned as to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from those railways, including the receiving, forwarding, and delivering of through traffic at through rates, and as to secure that there shall be between one railway system and another no unfair discrimination, by the granting of undue preferences or otherwise, and no unfair or uneconomic competition.

Obligation of Railway Authority and Federated States to afford mutual traffic facilities and to avoid unfair discrimination, etc.

(2) Any complaint by the Authority against a Federated State or by a Federated State against the Authority on the ground that the provisions of the preceding subsection have not been complied with shall be made to and determined by the Railway Tribunal.

The Act makes provision for the reference, at the request of either the Railway Authority or the administration of a railway owned by a Federated State, of disputes in matters such as the routing and interchange of traffic and the fixation of rates, to arbitration by a tribunal, called the Railway Tribunal. It will be observed that an Indian State may be allowed to reserve, as a condition of accession, the right to own and work its own railways and construct new railways notwithstanding item 20 in List I of the Seventh Schedule which is an exclusive Federal List.

See s. 196 for the constitution and the jurisdiction of the Railway Tribunal.

The Tribunal will have jurisdiction to entertain disputes between the Railway Authority and the administrations of railways owned and worked by a Federated State. But disputes on any issue between the Authority and the administrations of railways managed by companies cannot be referred to the Tribunal, machinery for the settlement of such disputed issues having been provided for in s. 197. Both the Railway Authority and the Federated States owning and working a railway system may appeal to the Tribunal for adequate protection against unfair or uneconomic competition or discrimination.

The procedure to be adopted on disputed issues relating to the proposal of the construction and reconstruction of railways is a little different and is stated in s. 195. Objections to the proposed construction of new lines will have to be lodged with the Governor-General who is to refer to the Railway Tribunal the question whether or not, the proposal

should be carried into effect either without or with such modification as the Tribunal may approve ; the proposal is not to be proceeded with save in accordance with the decision of the Tribunal. But where the Governor-General certifies that, for reasons of defence, effect should or should not be given to a proposal of new construction, objections relating thereto, if any, will not be forwarded to the Tribunal, but the decision of the Governor-General will be final.

Appeal by State to Railway Tribunal from certain directions of Railway Authority

194. If the Authority, in the exercise of any executive authority of the Federation in relation to interchange of traffic or maximum or minimum rates and fares or station or service terminal charges, give any direction to a Federated State, the State may complain that the direction discriminates unfairly against the railways of the State or imposes on the State an obligation to afford facilities which are not in the circumstances reasonable, and any such complaint shall be determined by the Railway Tribunal.

See Introduction to this Chapter.

Construction and reconstruction of railways

195.—(1) The Governor-General acting in his discretion shall make rules requiring the Authority and any Federated State to give notice in such cases as the rules may prescribe of any proposal for constructing a railway or for altering the alignment or gauge of a railway, and to deposit plans.

(2) The rules so made shall contain provisions enabling objections to be lodged by the Authority or by a Federated State on the ground that the carrying out of the proposal will result in unfair or uneconomic competition with a Federal railway or a State railway, as the case may be, and, if an objection so lodged is not withdrawn within the prescribed time, the Governor-General shall refer to the Railway Tribunal the question whether the proposal ought to be carried into effect, either without modification or with such modification as the Tribunal may approve, and the proposal shall not be proceeded with save in accordance with the decision of the Tribunal.

(3) This section shall not apply in any case where the Governor-General in his discretion certifies that for reasons connected with defence effect should, or should not, be given to a proposal.

See notes to s. 193, and s. 197.

Railway Tribunal

196.—(1) There shall be a Tribunal (in this Act referred to as 'the Railway Tribunal') consisting of a President and two other persons to be selected to act in each case

by the Governor-General in his discretion from a panel of eight persons appointed by him in his discretion, being persons with railway, administrative, or business experience.

(2) The President shall be such one of the judges of the Federal Court as may be appointed for the purpose by the Governor-General in his discretion after consultation with the Chief Justice of India and shall hold office for such period of not less than five years as may be specified in the appointment, and shall be eligible for re-appointment for a further period of five years or any less period :

Provided that, if the President ceases to be a judge of the Federal Court, he shall thereupon cease to be President of the Tribunal and, if he is for any reason temporarily unable to act, the Governor-General in his discretion may after the like consultation appoint another judge of the Federal Court to act for the time being in his place.

(3) It shall be the duty of the Railway Tribunal to exercise such jurisdiction as is conferred on it by this Act, and for that purpose the Tribunal may make such orders, including interim orders, orders varying or discharging a direction or order of the Authority, orders for the payment of compensation or damages and of costs and orders for the production of documents and the attendance of witnesses, as the circumstances of the case may require, and it shall be the duty of the Authority and of every Federated State and of every other person or authority affected thereby to give effect to any such order.

(4) An appeal shall lie to the Federal Court from any decision of the Railway Tribunal on a question of law, but no appeal shall lie from the decision of the Federal Court on any such appeal.

(5) The Railway Tribunal or the Federal Court, as the case may be, may, on application made for the purpose, if satisfied that in view of an alteration in the circumstances it is proper so to do, vary or revoke any previous order made by it.

(6) The President of the Railway Tribunal may, with the approval of the Governor-General in his discretion, make rules regulating the practice and procedure of the Tribunal and the fees to be taken in proceedings before it.

(7) Subject to the provisions of this section relating to appeals to the Federal Court, no court shall have any jurisdiction with respect to any matter with respect to which the Railway Tribunal has jurisdiction.

(8) There shall be paid out of the revenues of the Federation to the members of the Railway Tribunal other

than the President such remuneration as may be determined by the Governor-General in his discretion, and the administrative expenses of the Railway Tribunal, including any such remuneration as aforesaid, shall be charged on the revenues of the Federation, and any fees or other moneys taken by the Tribunal shall form part of those revenues.

The Governor-General shall exercise his individual judgment as to the amount to be included in respect of the administrative expenses of the Railway Tribunal in any estimates of expenditure laid by him before the Chambers of the Federal Legislature.

See notes to s. 193. The Railway Tribunal is a more or less a permanent body, although its members need not be wholetime servants of the Crown. The President of the Tribunal, who will be a judge of the Federal Court, will be appointed by the Governor-General in his discretion for a period of five years. The other two members will be selected by the Governor-General in his discretion from a panel of eight persons, to act only when a complaint is made to the Tribunal. In other words, the Tribunal will be constituted every time a case is referred to it for adjudication.

The parties to a dispute referred to the Tribunal must be the Federal Railway Authority and a Federated State. The disputes must refer to the subjects mentioned in ss. 193-194 above and in respect of these matters the jurisdiction of the Tribunal is exclusive. In respect of any matter referred to it for decision, the Tribunal can pass such orders as are mentioned in subsection (3).

An appeal lies from a decision of the Railway Tribunal to the Federal Court on a question of law, but no appeal shall lie from a decision of the Federal Court on any such appeal. The position of the Federal Court as the interpreter of the Constitution and constitutional documents is safeguarded.

Cl. (4): Charged on the revenues of the Federation: See ss. 33(3) and 34(1); these expenses are not to be submitted to the vote of the Legislature.

Rights of railway companies in respect of arbitration under contracts

197.—(1) Without prejudice to the general provisions of this Act with respect to rights and liabilities under contracts made by or on behalf of the Secretary of State in Council, the provisions of this section shall have effect with respect to any contract so made with a railway company which immediately before the commencement of Part III of this Act was operating a railway in British India.

(2) If a dispute arises under any such contract between the railway company concerned and either the Authority or the Federal Government, and if the matter in dispute is of such a nature that under the contract the company might require, or, but for some provision of this Act

might have required, it to be submitted to arbitration, the dispute shall be deemed to have arisen between the company and the Secretary of State, and the provisions of the contract relating to the determination of such a dispute shall have effect with the substitution of the Secretary of State for the Secretary of State in Council.

Any award made in an arbitration under the foregoing provisions of this section and any settlement of the dispute agreed to by the Secretary of State with the concurrence of his advisers shall be binding on the Federal Government and the Authority, and any sum which the Secretary of State may become liable or may so agree to pay by way of debt, damage or costs, and any costs or expenses incurred by him in connection with the matter, shall be paid out of the revenues of the Federation and shall be charged on those revenues but shall be a debt due to the Federation from the Authority.

The Railway Tribunal will have no jurisdiction to entertain such disputes as may arise between the Federal Government or the Railway Authority on the one hand and a railway managed by a company on the other. Such disputes will be deemed to have arisen between the company and the Secretary of State, and will be determined in accordance with the terms of the contract with that company. Any settlement of such disputes or any award made in arbitration to which such disputes have been referred, will be binding on the Federal Government and the Railway Authority.[1]

198. If and in so far as His Majesty's representative for the exercise of the functions of the Crown in its relations with Indian States may entrust to the Authority the performance of any functions in relation to railways in an Indian State which is not a Federated State, the Authority shall undertake the performance of those functions. Railways in Indian States which have not federated

As the Paramount Power, the Crown can exercise certain functions in relation to railways in an Indian State. If a State federates, such functions will be the concern of the Federal Government and will be governed by the provision of the Act. In the case of a non-federating State, His Majesty's representative may entrust to the Railway Authority the performance of such functions. For the appointment of His Majesty's representative for the exercise of the functions of the Crown, see s. 3(2).

199. Any powers of the Secretary of State in Council with respect to the appointment of directors and deputy directors of Indian railway companies shall be exercised Official directors of Indian railway companies

[1] See J.C.R. 395.

by the Governor-General in his discretion after consultation with the Authority.

By paragraph 3 of the Government of India (Commencement and Transitory Provisions) (No. 2) Order, 1936, it has been provided that this section is to come into force on the commencement of Part III of the Act, but until the Federal Railway Authority is established, this section without the words 'after consultation with the Authority' shall have effect. See s. 320 and notes thereto for the commencement of Part III of the Act.

PART IX

THE JUDICATURE

CHAPTER I

THE FEDERAL COURT

INTRODUCTION

The Judiciary in a Federation

The position of the judiciary in a federation is very important. As has been well explained by Marriott [1] the necessary implications of federalism are: a sacrosanct Instrument or written constitution; precise definition and rigid separation of powers; and the need for an authoritative interpreter of the constitution and a guardian of the powers thereby distributed. Under the Constitution of the United States,[2] the constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land. In America, any law made by any legislature which is repugnant to the constitution is void, and the judges of the Supreme Court, in any matter brought before them, can declare such a law, whether made by the federal legislature or state legislature, to be void. But in England, on the other hand, judges have to take the law as passed by Parliament as binding on them, and to interpret it. As pointed out by Bryce, whereas in England all laws are of equal validity, in America there are four different kinds of law possessing varying degrees or authority:—(1) Federal Constitution; (2) Federal Statutes; (3) State Constitutions; and (4) State Statutes. Of these, the first prevails against all the rest. Federal statutes, if within the competence of the federal legislature, prevail over state constitutions and state statutes; and state constitutions prevail over state statutes. The function of the judges is to interpret the law of the constitution, but on that interpretation depends the question of the validity of other laws. In effect, the judges act as guardians of the constitution against the possible assaults of the executive or the legislature. But of course, a law enacted in contravention of the constitution may remain law, until the question of its legality is raised before the Courts.

Federal Courts, like federal laws, operate directly upon the individual citizens, unlike Switzerland, where the enforcement of the decrees of the National Council is (as in Germany) entrusted to Cantonal or local administration.

The Supreme Court has *original jurisdiction* in all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party. Its *appellate jurisdiction* includes all cases from state courts involving conflicts between state law and federal law, all cases involving the interpretation of the federal constitution or of any federal law or treaty, cases involving a conflict between a state constitution and the constitution of the United States, cases between citizens of different states, and in all other cases where the decision of the (federal) Circuit Court of Appeals is not final. But the judicial powers of the Supreme Court do not extend to any suit against one of the United States by citizens of another state or by citizens of any foreign state.[3]

[1] Vol. II, pp. 298 *et seq.*

[2] Art. VI, s. 2.

[3] See Article III, s. 1, and the eleventh amendment made in 1798.

The Judiciary in the Dominions

Canada: Under the British North America Act, 1867, the Governor-General is to appoint Judges of the Superior Courts in each province. Under s. 101, the Parliament of Canada may, notwithstanding anything in the Act, provide for the constitution, maintenance and organization of a General Court of Appeal for Canada. There has been established a Supreme Court of Canada presided over by the Chief Justice of Canada with five puisne judges, which is the Court of Appeal from all the Provincial Courts. There is also a Court of Exchequer of one judge with partly exclusive, partly concurrent, jurisdiction. The Supreme Court of Canada, unlike the Supreme Court of the United States, is not, as such, the guardian and interpreter of the constitution. It is only when a provincial legislature in Canada passes an Act agreeing that the Supreme Court is to have jurisdiction in controversies (1) between the Dominion and the province; (2) between the province and any other agreeing province; (3) as to the validity of an Act of the Dominion Parliament; (4) as to the validity of a provincial Act, that the special jurisdiction of the Supreme Court is to be exercised. It has no original jurisdiction.

Australia: In the Commonwealth of Australia, there is a High Court with a Chief Justice and five justices, which has a limited original jurisdiction but is the court of appeal from the Supreme Courts of all the States. The State courts are invested with federal jurisdiction, and an appeal lies therefrom to the High Court. This is unlike the system in America, where there is a complete system of Federal courts existing throughout the Union, side by side with, and entirely independent of, the State courts, and there is no appeal from the State to the Federal courts. The Australian High Court has *original jurisdiction* in all matters (1) arising under any treaty; (2) affecting consuls or other representatives of other countries; (3) in which the Commonwealth or its nominee is a party; (4) between States, or between residents of different States, or between a State and a resident of another State; (5) in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth.

South Africa: By ss. 95 and 96 of the South Africa Act, 1909, the Supreme Court of South Africa consists of the Chief Justice of South Africa, ordinary judges of appeal, and judges of the several divisions of the courts in the provinces. There is an Appellate Division of the Supreme Court. The various Supreme Courts and the High Courts in the provinces existing at the time of the Union became provincial divisions of the Supreme Court. These superior courts are to exercise original jurisdiction in all matters (*a*) in which the Government of the Union or persons on their behalf are parties; (*b*) in which the validity of any provincial law is in dispute.

Appeal to the King in Council from Dominion Courts

South Africa: Under s. 106 of the South Africa Act, 1909, there is no appeal from the Supreme Court to the King in Council, but the right of King in Council to grant special leave to appeal is not to be impaired. The Union Parliament may make laws limiting the matters for which special leave to appeal may be asked; but Bills containing any such limitations are to be reserved for the signification of His Majesty's pleasure.

Canada: Each Province in Canada has its Supreme Court from which appeals lie direct to the King in Council. There is no appeal as of right from the Supreme Court of Canada to His Majesty in Council; but the Royal Prerogative to grant special leave to appeal, except in

criminal cases, is preserved. An attempt on the part of the Dominion Parliament to limit such right of appeal was declared by the Privy Council in *Nadan* v. *The King* (1926) A.C. 482 to be void as against Judicial Committee Act of 1844 (an Imperial Act). The Privy Council is the final arbiter of the interpretation of the Dominion Constitution. Its right to hear appeals from Canada is wholly unfettered.

Recent decisions

But since the Statute of Westminster was passed the law has been substantially altered as held by the Privy Council in two recent decisions: *British Coal Corporation* v. *The King*,[1] and *Moore & Ors* v. *A.G. for the Irish Free State*,[2] the Privy Council held that, as a result of the passing of the Statute, the limitations on the power of the Dominion Parliament as laid down in *Nadan* v. *The King* (supra) no longer existed. In the last case, the Privy Council held that it was not competent for the Parliament in Canada to take away in criminal matters the right of appeal to the King in Council. After the passing of the Statute of Westminster, a Canadian Act was passed in 1933 repealing the right of appeal to the King in Council. On a question being raised as to the validity of this Canadian Act of 1933, the Privy Council held in the *British Coal* case that s. 2(1) of the Statute of Westminster provided that the Colonial Laws Validity Act, 1865, should not apply to any law made by the Parliament of any Dominion and s. 2 (2) provided that no law made by the Parliament of a Dominion (including laws made by the Provinces of Canada) should be void on the ground that it was repugnant to the law of England or to any existing or future Act of Parliament of the United Kingdom. Similarly, in the second case, the question arose as to the validity of an Irish Act passed in 1933 repealing the right of appeal to His Majesty in Council. The Privy Council held that before the passing of the Statute of Westminster, it was not competent of the Irish Free State Parliament to pass an Act abrogating the Treaty because of the Colonial Laws Validity Act, 1865. But the effect of the passing of the Statute of Westminster has been to remove the fetter which lay on the Irish Free State legislature. That legislature could now pass Acts repugnant to an Imperial Act.

Special leave to appeal

The principles upon which the Judicial Committee grants special leave to appeal from the highest Federal Courts in the Dominions were laid down in *Prince* v. *Gagnon*[3] it was there stated that their Lordships will not advise Her Majesty to admit an appeal from the Supreme Court of the Dominion save where the case is of gravity, involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character. This statement was followed and approved in subsequent cases.[4] See *Motichand* v. *Ganga Prasad*[5] as regards the Privy Council.

Australia : Each of the states has its own Supreme Court with a right of appeal to the King in Council. Under s. 73 of the Australia Act 1900, the judgement of the High Court as a court of appeal is final and conclusive. Whereas in Canada the King's prerogative to grant special leave is in all cases reserved, s. 74 of the Australia Act says that no appeal lies to the King in Council in constitutional matters from the High Court unless with its certificate. But in such matters, there will

[1] [1935] A.C. 500. [2] [1935] A.C. 484. [3] 8 App. Cas. 103.
[4] Lord Davey in *Clergue* v. *Murray* [1903] A.C. 521. [5] (1902) 29 I.A. 40.

be an appeal from the State Supreme Courts to the Privy Council. This led to an acute conflict between Australia and the Privy Council[1] which was ultimately settled by an Australian Act of 1907 providing that cases involving constitutional questions should be heard not by the State Supreme Court but by the Federal High Court. Practically the High Court has been made the final arbiter of the interpretation of the Commonwealth constitution, though theoretically it is open to the Privy Council to grant special leave to appeal from the High Court.

For a general discussion on Judicial Appeals from the Dominions, see Keith's *Sovereignty of the British Dominions*;[2] for a description of the struggle in Australia,[3] *Marriott*;[4] Bentwich *Privy Council Practice*.[5]

Federal Court in India[6]

As pointed out in the Introduction to Part II, Chapter I (see particularly under head DISTINCTIVE CHARACTERISTICS OF FEDERALISM) one of the essentials of a Federation is the existence of a judicial body entrusted with the authority to safeguard the constitution and competent to interpret its terms. The Federal Court is at once the interpreter and guardian of the constitution. See notes above under CONSTITUTION OF THE UNITED STATES. Such a tribunal must be independent of Federal, Provincial and State Governments and the ultimate decision of all questions concerning the respective spheres of Federal, Provincial, and State authorities is to be entrusted to it. In the absence of such a tribunal, the High Courts and the State Courts may interpret the constitution in different ways with resulting confusion and ambiguity. The importance of the Federal Court is enhanced, in the case of India, by the fact that it is not only the rights of individuals and Provinces, but also of the Indian States, which are semi-independent and outside British India, that require to be interpreted and protected. This court assures the Federation as well as the constituent States of an independent field of governmental activity, and restrains the two sets of executive and legislative organizations from transgressing the sphere appointed for them by the constitution.

The Federal Court of India will consist of a Chief Justice, called the Chief Justice of India and ordinarily six judges (unless the Federal Legislature present an address to the Governor-General praying that His Majesty may be pleased to increase the number), who will be appointed by His Majesty, and will hold office *during good behaviour*.[7] The retiring age is 65 years, that in the case of High Court judges being 60; so a High Court judge after retirement, can be appointed to the Federal Court.[8]

Jurisdiction

Jurisdiction of the Federal Court is both original, appellate and advisory.[9] It is to have exclusive *original jurisdiction* (*a*) in matters involving the interpretation of this Act or of federal laws or the determination of rights and obligations arising thereunder where the parties to the dispute are any two or more of the following:—the Federation, any of the Provinces or any of the Federated States. It is to be noted that the Federal Court will have jurisdiction in the above matters in dispute between Federated States,[10] subject to

[1] *Webb* v. *Outtrim* (1907) A.C. 81.
[2] (1929), Chapter XIII, pp. 255–59.
[3] See pp. 54–56.
[4] Vol. I, pp. 240–43.
[5] (2nd ed., 1926), pp. 34–41.
[6] See W.P.Intr. 62–65; W.P.Prop. 151–62; J.C.R. 322–28.
[7] See notes to s. 200(2).
[8] J.C.R. 331.
[9] ss. 204 and 205–07.
[10] J.C.R. 324.

the Proviso to s. 204; in matters involving the interpretation of, or arising under, any agreement entered into after the commencement of the Act between the Federation and a Federal Unit or between the Federal Units, unless the agreement otherwise provides.

Appellate jurisdiction of the Federal Court is provided in ss. 205–07.

Appellate jurisdiction

This is an exclusive appellate jurisdiction from any decision by the High Court or any State Court, so far as it involves the interpretation of this Act or Orders in Council made thereunder (in cases not coming under s. 204) or of any rights or obligations arising thereunder, such appeal to lie with the certificate of the High Court under s. 205, or, if the Federal Legislature so provides, with the special leave of the Federal Court, unless the subject matter is of a specified value.[1]

In its original or appellate jurisdiction, the Federal Court will be called upon to interpret the following kinds of laws :—(*a*) the Government of India Act, 1935 and any Order in Council made thereunder; (*b*) laws in force in India at the time the Part III of the new Act is brought into force, until repealed or modified as provided in s. 292; (*c*) federal laws; (*d*) provincial or state laws. The Court cannot question the validity of (*a*) or (*b*), but it will be its duty to pronounce on the relative validity of the conflicting provisions of (c) and (*d*).

Advisory jurisdiction[2]

The Federal Court is to have an advisory jurisdiction like that possessed by the Privy Council under s. 4 of the Judicial Committee Act, 1833,[3] which provides that on a reference by His Majesty to the Committee of any matter whatsoever as His Majesty may think fit, the Committee shall hear and consider the same and shall advise His Majesty thereon.[4] Colonial issues have often been referred by His Majesty to the Judicial Committee.[5] *In re Sir Stuart Samuel*[6] the question of disqualification of a Member of Parliament, a partner in a firm having a contract with the India Office, was referred. The advisory jurisdiction is not limited to the federal sphere, and the Governor-General's discretion to refer any matter he thinks fit, is unfettered. See s. 213. The Governor-General without consulting his ministers can refer any question he chooses, whereas the King in referring any question to the Judicial Committee acts on the advice of his ministers. The procedure for the delivery of judgement as laid down in Cl. (2), is different from that of the Judicial Committee where there is only one judgement.

Reference may be made to the important observations of the Judicial Committee in *Attorney-General, Ontario* v. *Attorney-General, Canada*[7] on a similar provision in an Act of the Dominion Parliament empowering the Executive Government of the Dominion to obtain by direct request answers from the Supreme Court of Canada on important questions of law and fact. It was objected on behalf of the Provinces that this Act was *ultra vires*. While holding that it was *intra vires* of the Legislature, the Judicial Committee dealt with at length on the objection made as to the impropriety of such reference to the Supreme Court. It was urged that the power to ask questions of the court was so wide (as it is under s. 4 of

1 J.C.R. 325.

2 See W.P.Prop. 161; J.C.R. 327.

3 3 and 4 Will IV, c. 41.

4 See *In re Piracy Jure Gentium* [1934] A.C. 586.

5 See *Claim of Newfoundland to Labrador* (1927) 43 T.L.R. 289; *Precedence of Judges* 7 Moo. P.C. 23, 29.

6 [1913] A.C. 514.

7 [1912] A.C. 571, at pp. 582-83 and 589.

the Judicial Committee Act, 1833, and under s. 213 of the new Act) in its terms as to admit of gross interference with the judicial character of the court, and therefore, of grave prejudice to the rights of the Provinces and of the citizens. Though no direct effect was to result from the answer given by the court, and no right or property was thereby adjudged, yet the indirect result, it was said, might be most fatal. When the opinion of the highest court of appeal was given upon a certain question it was not human nature to expect that, if the same question was again raised in a concrete case by a litigant in the same court, its members could divest themselves of their pre-conceived opinion; whereby might ensue not merely distrust of their freedom from prepossessions, but actual injustice inasmuch as they would in fact, however unintentionally, be biassed. Though arguments might be heard before the court gave its answer, yet the persons who might be affected by the answer could not be known beforehand, and therefore would be prejudiced without so much as an opportunity of making their submissions before the Supreme Court arrived at what would virtually be a determination of their rights. If the power to refer questions for answer to the Supreme Court were abused, manifold evils might follow, including undeserved suspicion of the course of justice, and much embarrassment and anxiety to the judges themselves. The Judicial Committee while holding that they had nothing to do with the wisdom or expediency, or policy of the Act impugned, said:

> It is sufficient to point out the mischief and the inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leave it to the consideration of those who alone are lawfully and constitutionally entitled to decide upon such a matter.[1]

Executive authority of the Federal Court

As already stated above under CONSTITUTION OF THE UNITED STATES, Federal Courts in the United States like the federal laws, operate directly upon the individual citizen, unlike Switzerland or Germany. The American Federal Courts, 'constituting a complete judicial hierarchy, are equipped with powers sufficient to compel obedience to the laws embodied in the Constitution or enacted by Congress'.[2] They have the machinery to execute their own decrees and orders. But this is not the case with the Federal Court of India. S. 204(2) provides that the Federal Court in the exercise of original jurisdiction can only pronounce declaratory judgements. S. 209(1) lays down that when it allows an appeal, it is to remit the case to the court from which the appeal was brought, with a declaration as to the decree or order to be substituted for the original decree or order and the lower court shall give effect to the decision of the Federal Court. In s. 210, it is provided that all authorities, civil and judicial throughout the Federation shall act in aid of the Federal Court. So the Federal Court here, as in Switzerland and in Germany, has no direct executive authority.

Appeal from Federal Court

An appeal will lie to the King in Council from a decision of the Federal Court passed by the Federal Court in its original jurisdiction, in cases involving issues of the constitutional rights of the Federation and its constituent units, or of the units *inter se*. Such an appeal lies as of right; in all other cases appeals will be by leave of the Federal Court or of the Privy Council.[3] But there is no right of appeal, whether by special leave or otherwise, direct to the Privy Council from any decision of the

[1] p. 589. [2] Marriott, Vol. II, p. 308. [3] See s. 208.

High Court in cases where, under the provisions of this Act, an appeal lies to the Federal Court. Thus the Act makes the Privy Council the final arbiter of the interpretation of the Indian constitution.

Practice and procedure

The process of the Federal Court will run throughout the Federation and within those territories, all authorities, civil and criminal, will be bound to recognize and enforce the process and the judgement of the Federal Court; and all other courts within the Federation will be bound to recognize the decisions of the Federal Court as binding upon themselves. Powers, similar to those enjoyed by the High Courts, for ordering the attendance of persons, and the discovery or production of documents, and for dealing with contempt of court, have been conferred on the Federal Court to grant remedies. The Federal Court, with the approval of the Governor-General, may make rules of court regulating the practice and procedure of the court, including the fees to be charged in respect of the proceedings in the court.

Supreme Court

In the White Paper, the proposal was considered that there should be established a Supreme Court to act as a final court of appeal in British India from the Provincial High Courts in matters other than those falling within the jurisdiction of the Federal Court. The object was to limit the right of appeal from the Indian High Courts to the Privy Council. On the other hand, there were raised the objections that the establishment of a Supreme Court would mean an unnecessary and unjustifiable expense and that it would be difficult to get a body of judicial talent of the necessary calibre for such a court, in addition to the judges required for the Federal and the High Courts. It was also suggested that the Supreme Court, if established, might be constituted as a division of the Federal Court.[1] In view of this difference in opinion, His Majesty's Government was of opinion that the Federal Legislature was to be empowered to extend the appellate jurisdiction of the Federal Court if there was sufficient unanimity of view on this matter.

But the introduction of a Bill for this purpose will require the previous sanction of the Governor-General given at his discretion. When such a Federal Act enlarging the appellate jurisdiction of the Federal Court has been passed, the Federal Legislature may partially or wholly abolish direct appeals in civil cases from High Courts in British India to the Privy Council.

The Joint Parliamentary Committee in their Report,[2] did not recommend the proposal for the establishment of a Supreme Court (as made in the W.P.Prop. 163–67) which would be independent of the Federal Court, as there would certainly be overlapping of jurisdiction. The establishment of a Court of Appeal for the whole of British India was desirable and could be most conveniently effected by an extension of the jurisdiction of the Federal Court. Such a court could sit in two chambers, the first dealing with Federal cases, the second with British India appeals. The two chambers would remain distinct, though the judges of one chamber may sit in the other. The recommendations in the Joint Parliamentary Committee have been given effect to in s. 206.

Federal Court Order

By the Government of India (Federal Court) Order, 1936, it has been provided that Chapter I of Part IX (except sections 206 and 215) will come into force from the first October, 1937. But s. 205, dealing with the appellate jurisdiction of the Federal Court in appeals from High Courts in British

1 W.P.Intr. 66.

2 Par. 329-30.

India, will come into force from 1 April 1937, and certificates under this section may be given though the Federal Court has not yet been constituted. Salaries, allowances and pensions of the Chief Justice and the other judges have been provided for in this Order, and also in the (Federal Court) Order, 1937, which brings s. 215 in force.

Establishment and constitution of Federal Court

200.—(1) There shall be a Federal Court consisting of a Chief Justice of India and such number of other judges as His Majesty may deem necessary, but unless and until an address has been presented by the Federal Legislature to the Governor-General for submission to His Majesty praying for an increase in the number of judges, the number of puisne judges shall not exceed six.

(2) Every judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty-five years :

Provided that—

(*a*) a judge may by resignation under his hand addressed to the Governor-General resign his office :

(*b*) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

(3) A person shall not be qualified for appointment as a judge of the Federal Court unless he—

(*a*) has been for at least five years a judge of a High Court in British India or in a Federated State ; or

(*b*) is a barrister of England or Northern Ireland of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing ; or

(*c*) has been for at least ten years a pleader of a High Court in British India or in a Federated State or of two or more such Courts in succession.

Provided that—

(i) a person shall not be qualified for appointment as Chief Justice of India unless he is, or

when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader; and

(ii) in relation to the Chief Justice of India, for the references in paragraphs (*b*) and (*c*) of this subsection to ten years there shall be substituted references to fifteen years.

In computing for the purposes of this subsection the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which a person has held judicial office after he became a barrister, a member of the Faculty of Advocates or a pleader, as the case may be, shall be included.

(4) Every person appointed to be a judge of the Federal Court shall, before he enters upon his office, make and subscribe before the Governor-General or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act.

See W.P.Intr. 62–65; W.P.Prop. 151–62; J.C.R. 322–28. See notes at the head of this Chapter. The Federal Court is to be established notwithstanding that the Federation has not yet been established. See s. 318.

Cl. (1): Chief Justice of India: For his salary see s. 201; for temporary appointment of acting Chief Justice, see s. 202; for power of appointment to staff of the Federal Court, see s. 242(4); he is to appoint an arbitrator for the allocation of expenses for commission or of pension charged on the revenues of the Federation, between the Federation and a Province, under s. 156.

The number of puisne judges is fixed at six but it may be increased by His Majesty from time to time, after considering any address from the Federal Legislature submitted to him through the Governor-General.

Cl. (2): Royal Sign Manual is the Royal signature. See notes to s. 1 under this heading.

Proviso:—(*b*) *Removal:* By the Act of Settlement, it was provided that judges in England are to hold office 'quamdieu se bene gesserint' i.e. during good behaviour, but they may be removed from office upon address of both Houses of Parliament. Previously they held office during the King's pleasure.

Under s. 102 old Act, the judges held office during His Majesty's pleasure. This has been changed under the new Act, ss. 200(2) Prov. (*b*), in the case of a judge of the Federal Court, and s. 220(2) Prov. (*b*) in the case of a High Court judge, providing that a judge may be removed by His Majesty for misbehaviour.[1] But s. 240(1) of the new Act provides that unless expressly provided by this Act, every person holding any civil post under the Crown in India holds office during His Majesty's pleasure. The reason for this exceptional rule in the case of judges is well explained by Hamilton in the *Federalist* in the following words:

[1] See J.C.R. 323.

The standard of good behaviour for the continuance of office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince ; in a Republic, it is a no less excellent barrier to the encroachments and oppression of the legislative body.

Under the American constitution, the judges of the Federal Courts hold office during good behaviour and their salary shall not be diminished during their continuance in office. The legislature fixes by statute the number of judges of the Supreme Court, and their remuneration, and the President with the advice of the Senate appoints them. Once appointed, they hold office for life, unless removed by impeachment.

Reference to the Privy Council may be made by His Majesty under s. 4 of the Judicial Committee Act, 1833, 3 and 4 Will. IV, c. 41.

Cl. (3): See W.P.Prop. 153 as modified by J.C.R. 323. Members of the Indian Civil Service are not eligible for permanent appointment, as Chief Justice of India, who must be a barrister or pleader of at least fifteen years' standing. But they may be appointed puisne judges of the Federal Court. They are, however, eligible for permanent appointment as Chief Justice of a High Court.[1]

See Introduction to this Chapter under FEDERAL COURT ORDER.

Salaries, etc. of judges

201. The judges of the Federal Court shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council :

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

See W.P.Prop. 152 ; J.C.R. 328. Under the old Act, salaries of High Court judges were non-votable.[2] This is the same under the new Act,[3] but discussion on salaries of judges is not prevented.

See Introduction to this Chapter under FEDERAL COURT ORDER.

Temporary appointment of acting Chief Justice

202. If the office of Chief Justice of India becomes vacant, or if the Chief Justice is, by reason of absence or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other judges of the court as the Governor-General may in his discretion appoint for the purpose.

[1] See Prov. to s. 222(3).

[2] S. 72D(3) (v).

[3] S. 33(3) (d) and s. 34(1).

Compare s. 222 below, regarding the High Court, and old s. 105(1).

In his discretion: See Introduction to Part II, Chapter II, under this title.

203. The Federal Court shall be a court of record and shall sit in Delhi and at such other place or places, if any, as the Chief Justice of India may, with the approval of the Governor-General, from time to time appoint. Seat of Federal Court

204.—(1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other court, have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends: Original jurisdiction of Federal Court

Provided that the said jurisdiction shall not extend to—

(*a*) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State; or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State; or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute;

(*b*) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment.

See W.P.Intr. 63; W.P.Prop. 155; J.C.R. 324.

See Introduction at the head of this Chapter under ORIGINAL JURISDICTION and EXECUTIVE AUTHORITY OF FEDERAL COURT. The jurisdiction of the Federal Court is ousted, under s. 133, in the case of interference with water supply, when the Governor-General may appoint a Commission to enquire into the matter. See J.C.R. 224–26, 410.

Cl. (1): The original jurisdiction is to be an exclusive one so that no proceedings can be taken by one unit of the Federation against another in the Courts of either of them. Parties to a dispute in respect of any matter falling within the original jurisdiction must be (*a*) the Federation on the one hand, and one of its constituents on the other, i.e. either a Province or a Federated State; or (*b*) two Provinces or two Federated States; or (*c*) a Province and a State. The dispute (unless excluded by agreement), which may be one of fact or of law, must relate to the existence or the extent of a legal right, and must therefore involve the interpretation of this Act or any Order in Council made thereunder, or of any federal or provincial law. Cases relating to conflicts of jurisdiction between the Federation on the one hand and the constituent units on the other, or between the constituent units *inter se* are to be instituted in the Federal Court in its original jurisdiction. The executive and the legislative powers of the Federation as well as those of the Provinces are defined in the Act, and any violation by one party of the rights of any other can be challenged in this court.

Under s.133, the jurisdiction of the Federal Court is ousted as regards the subjects mentioned in ss. 140–32, i.e. complaints as to interference with water supply.

Proviso—(i): The dispute to which a Federated State is a party must involve the interpretation of this Act or any Order in Council made thereunder or of the Instrument of Accession. If there be any dispute as to the existence or the extent of the authority of the Federation in the Federated State, it is to be decided by the Federal Court in its original jurisdiction. Its jurisdiction is an exclusive one.[1] A dispute as to the validity of a State law which is alleged to be void as being repugnant to a Federal Law extending to that State under s. 107(3) comes within the original jurisdiction of the Federal Court.

Proviso—(ii): Provision has been made in Part VI of the Act[2] for the administration in a Federated State of any federal law applicable thereto by agreement between the Federation and the State. If there be any dispute as to the interpretation of the agreement, it is to be decided by the Federal Court in its original jurisdiction, unless excluded by the agreement itself.

Proviso—(iii): The Crown by virtue of treaties, and also as the Paramount Power in India possesses certain powers over the Indian States.[3] With the approval of His Majesty's representative, an agreement may be made by and between the Federation and a State, whereby the Federal Government is entrusted with the exercise of some or all those powers.[4] Unless the agreement expressly excludes the jurisdiction of the Federal

1 J.C.R. 324.
2 S. 125.
3 S. 5.
4 See s. 198.

Court, any dispute relating thereto may be referred to that court in its original jurisdiction.

Limitation for questioning validity of Act: In the White Paper, it was proposed[1] that in order to minimize uncertainty of law and and opportunities for litigation as to the validity of Acts, provision should be made to limit the period within which the Act may be called in question on the ground that exclusive powers to pass such legislation were vested in a Legislature in India other than that which enacted it. The J.C.R. in their Report [2] say that they knew of no precedent for a provision of this kind but they were not disposed to reject it on that account; but if it be adopted, the period of limitation should be adequate and not less than five years. This proposal has not been adopted in this Act.

Appeal: An appeal from the Federal Court in its original jurisdiction lies without leave to the Privy Council; see s. 208(*a*).

205.—(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

Appellate jurisdiction of Federal Court in appeals from High Courts in British India

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.

See W.P.Intr. 63, W.P.Prop. 156; J.C.R. 325; see also Introduction to this Chapter under APPELLATE JURISDICTION. For appeals from a High Court in a Federated State, see s. 207.

Section 205 deals with the appellate jurisdiction of the Federal Court in legal proceedings in British India. Appeals are allowed only from any judgement, decree or final order of a High Court in British India. 'High Court' in British India is defined in s. 219.

No appeal will lie unless the High Court certifies that the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935 or any Order in Council made thereunder. In other words, the case must involve a constitutional issue. If there be no constitutional issue, but the case involves a substantial question of any other branch of law, no appeal will lie. If the High Court refuses a certificate, there cannot be any appeal, as there is no provision for special leave by the Federal Court for the filing of an

[1] W. P. Prop. 118.

[2] 235.

appeal. This seems to be a *lacuna*, because, if the High Court erroneously refuses a certificate, there is no remedy in the Federal Court. Of course, any remedy which may be available in the Privy Council is not affected by section 205. It will be noticed that, whereas in the Original jurisdiction of the Federal Court the dispute is limited to one between the units of the Federation or between a unit and the Federation, in the appellate jurisdiction, there is no such limit and disputes between citizens can be brought for adjudication, subject to the conditions mentioned above. A citizen may not file a suit in the Original side, but he may file an appeal in the Appellate side, provided he gets the requisite certificate from a High Court.

The certificate opens the door of the Appellate side of the Federal Court. Once the door is opened and the appeal is lodged, the grounds of appeal are specified in subsection (2). They are:

(*a*) that a constitutional question has been wrongly decided,

and, (*b*) any ground on which the appellant could have appealed without special leave to the Privy Council if no certificate had been given by the High Court, i.e., any ground which he could have taken in the Privy Council, *as of right*. These grounds are set out in sections 109 and 110 of the Code of Civil Procedure,

and, (*c*) with the leave of the Federal Court, any other ground.

It is thus possible to take any ground, whether of law or fact, once a certificate is obtained from the High Court. (*a*) is conditional ground, (*b*) is Privy Council ground and (*c*) is any other ground.

No Direct Appeal: The last words of subsection (2) provide that if the High Court certifies that a substantial question of constitutional law exists, i.e. if the case is appealable to the Federal Court, no direct appeal shall lie to the Privy Council, either with or without special leave. In other words, in a case involving a constitutional issue, and the High Court so certifies, the Federal Court is interposed between the High Court and the Privy Council. Appeals to the Privy Council from the Federal Court are dealt with in section 208.

Certificate: In W.P.Prop. 157, it is stated that an appeal to the Federal Court will be by way of special case on facts stated by the court from which the appeal is brought. This is repeated in J.C.R. 325 which says, 'it is proposed that all appeals to the Federal Court should be in the form of a special case to be stated by the court appealed from'. But in s. 205 reference is made to a certificate to be granted by a High Court of British India. It is only in the case of an appeal from a High Court of a Federated State that there is to be a special case stated for the opinion of the Federal Court.[1] So it would appear that a certificate under s. 205(1) need not be in the form of a special case stated for opinion, unless so provided by rules under s. 214.

Procedure: The practice and procedure are to be regulated by rules made under s. 214.

Enforcement of decree of Federal Court: The Federal Court, if it allows the appeal, is to remit the case to the Court from which the appeal was brought with a declaration of the proper judgement, decree, or order to be substituted.[2] As regards enforcement of decrees and orders of the Federal Court, see s. 210.

See Introduction to this Chapter under FEDERAL COURT ORDER.

[1] See ss. 207(2) and 211.

[2] See s. 209.

206.—(1) The Federal Legislature may by Act provide that in such civil cases as may be specified in the Act an appeal shall lie to the Federal Court from a judgment, decree or final order of a High Court in British India without any such certificate as aforesaid, but no appeal shall lie under any such Act unless— Power of Federal Legislature to enlarge appellate jurisdiction

(*a*) the amount or value of the subject matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum not less than fifteen thousand rupees as may be specified by the Act, or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(*b*) the Federal Court gives special leave to appeal.

(2) If the Federal Legislature makes such provision as is mentioned in the last preceding subsection, consequential provision may also be made by Act of the Federal Legislature for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to His Majesty in Council, either with or without special leave.

(3) A Bill or amendment for any of the purposes specified in this section shall not be introduced into, or moved in, either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

See W.P.Intr. 63; W.P.Prop. 156; J.C.R. 329–30, and Introduction to this Chapter under SUPREME COURT.

This section gives power to the Federal Legislature to enlarge the appellate jurisdiction of the Federal Court in civil cases and correspondingly diminish the existing extent of appeal from the High Courts in British India direct to the King in Council. Similar provisions in case of the Dominions may be compared; see notes at the head of this Chapter under APPEAL TO THE KING IN COUNCIL FROM DOMINION COURTS; AND SUPREME COURT. It is to be noted that the Federal Legislature cannot in any way limit the prerogative of the Crown to grant leave in criminal matters.

Cl. (1) (a): Under s. 318, the Federal Court is to be started before the establishment of the Federation; i.e. started from the time the Act comes into operation in the Provinces under s. 320(2) of the new Act; and till such an Act as is contemplated in s. 206 is passed, there can be no appeal to the Federal Court without the certificate of the High Court under s. 205, even though the value of the subject matter in dispute be very high. Until the Act contemplated in s. 206(1) is passed, following by consequential changes in the law as provided in s. 206(2), appeals

from the High Court to the Privy Council will be governed by Indian Civil Procedure Code,[1] and other existing law.

Cl. (2): See notes at the head of this Chapter under APPEAL TO THE KING IN COUNCIL FROM DOMINION COURTS, and cf. s. 106, South Africa Act, and s. 74 of the Australia Act, where it is provided the legislatures of these Dominions may make laws limiting the matters in which the special leave of the King in Council may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure.

Under this section, it is open to the Federal Legislature to pass laws limiting or abolishing the existing right of appeal from provincial High Courts to the King in Council whether with or without special leave. Under s. 110 (*b*) (*iii*) of this Act, it is not open to any Legislature in India to pass any law derogating from His Majesty's prerogative right to grant special leave to appeal from any court, unless this is expressly permitted by any subsequent provisions of this Act. Such express permission is given by this section. But Bills for such purpose can only be introduced with the previous sanction of the Governor-General. But such previous sanction, if given, will not preclude the Governor-General, when the Bill is passed by the Legislature, from exercising his power to withhold assent or to reserve the Bill for the signification of His Majesty's pleasure under s. 32; see s. 109. It will be noticed that such Bills are not necessarily to be reserved for the signification of His Majesty's pleasure as under the South African and Australian Acts. In India, it is open to the Governor-General to give his assent to, or withhold assent from, it.

In his discretion: See notes under this title at the head of Part II, Chapter II above.

Judgement, decree or final order: Judgement is defined in s. 2(9) of the Code of Civil Procedure as meaning the statement given by the judge of the grounds of a decree or order.

In Cl. 15 of the Letters Patent, the word is used according to the decisions of the Calcutta High Court as 'meaning a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, preliminary or interlocutory, the difference between them being that a final judgement determines the whole cause or suit, and a preliminary or interlocutory judgement determines only a part of it, leaving other matters to be determined'.

Decree is defined in s. 2(2) of the Code of Civil Procedure as meaning the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be preliminary or final. An Act of State is not a decree and is not appealable. *In re Maharajah Madhava Singh* (1905) 32 Cal. 1 (P.C.)

Final Order: Order is defined in s. 2(14) of the Code of Civil Procedure as meaning the formal expression of any decision of a Civil Court which is not a decree. For final order see s. 109, Code of Civil Procedure. An order is final if it finally disposes of the rights of the parties. *Ramchand* v. *Goverdhandas* (1920) 47 I.A. 124; 47 Cal. 918. The finality must be finality in relation to the suit; if the rights of the parties have still to be determined, the order is not final, and no appeal lies against it under s. 109(*a*) of the Code of Civil Procedure to the King in Council. *Abdul Rahman* v. *Cassim* (1933) 60 I.A. 76, 81. An order remanding the suit

[1] Ss. 109–12

for decision on the merits is not a final one. See Mulla's *Code of Civil Procedure* (10th ed., 1934), pp. 352–54.

Cl. (a): The amount or value of the subject matter, etc. These words are taken from s. 110, Paragraph I of the Code of Civil Procedure. See Mulla's *Code of Civil Procedure* notes to ss. 109 and 110, regarding appeals to the Privy Council from the High Court.

An appeal[1] lies to the Privy Council (*a*) from any decree or final order passed on appeal by a High Court or any other court of final appellate jurisdiction; (*b*) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and (*c*) from any decree or order when the case is certified to be a fit one for appeal to His Majesty.[2] In each of cases mentioned in Cl. (*a*) and (*b*) above, the amount or value (1) of the subject matter of the suit in the first court (2) as well as of the subject matter in dispute on appeal to His Majesty in Council must be at least ten thousand rupees.

Date of Valuation: As to (1), the material date is the date of institution of the suit: *Rajendra Kumar* v. *Rash Behari* (1931) 35 C.W.N. 669, P.C.; profits and interest upto the date of the institution of the suit can be included: *Mangamma* v. *Mahalakshmamma* (1930) 57 I.A. 56: 53 Mad. 167. As regards (2), the material date is the date of the decree from which appeal to His Majesty in Council is to be made: *Gooroopersad* v. *Juggatchunder* (1860) 8 M.I.A. 166.

The sum of money actually at stake may not represent the true value. The proceedings may, in many cases, such as a suit for instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may affect a much greater value, and its determination may govern rights and liabilities beyond the limit—see *Radhakrishna v. Sunderaswamier* (1922) 49 I.A. 211 at 216; 45 Mad. 475 at 481. So where the rent claimed in the suit was less than Rs.10,000, yet the liability was of a recurring nature, and the property was above that value, the value of the subject matter was to be claimed to be over Rs.10,000. The value as laid in the plaint is conclusive where the court fee is payable on the market value and the plaintiff has paid court fee on a smaller amount. *Rajendra Kumar* v. *Rash Behari* (*supra*).

Or the judgement or value: Cf. paragraph 2 of s. 110 of the Civ. P. Code: 'or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value'. See Cl. 39 of the Letters Patent, 1865, for the High Courts of Calcutta, Bombay and Madras, providing for appeals to the Privy Council in civil cases. The date for determining the value of the property here is the date of the judgement, decree, or final order. It is to be noted that the expression used is *property*, but in the earlier part of Cl. (1) (*a*), the expression used is *subject matter of the dispute*. It has been held that paragraph II of s. 110, Civ. P. Code applies only to cases which involve some claim or question to or respecting property additional to the actual subject matter in dispute in the appeal and to be taken into account therewith; and that such cases are quite distinct from cases covered by paragraph I of s. 110, Civ. P. Code. Cases which involve nothing but the actual subject matter in dispute in the appeal, are governed exclusively by the first paragraph. The two paragraphs refer to entirely different matters. See *Subramania* v. *Sellammal* (1916) 39 Mad. 843 at 846

[1] S. 109 Civ. P. Code. [2] S. 110

and 849, and also *Udaychand* v. *Guzdar* (1925) 52 I.A. 207 : 52 Cal. 653. In the last case, the Privy Council were not 'inclined to attempt any precise definition of the word "property". The Civil Procedure Code has not done so, and any definition might not be found in the future precisely to fit the circumstances which the kaleidoscope of actual experience may produce.' On the facts of that case, their Lordships held that the claim was too remote to be entitled to the description of being property indirectly involved in the issue of the suit. In *Muhammad Ashgar* v. *Abida Begum* (1932) 54 All. 858, the word 'property', it was held, need not necessarily mean the subject matter in dispute in the suit. Where the value of the subject matter of the suit as filed was over Rs.10,000 but the value of the subject matter in dispute on appeal to His Majesty in Council was less than Rs.10,000 and where, on the other hand, the proposed appeal necessarily involved a decision as to the validity of an award dealing with property of far greater value which had been declared invalid by the High Court, it was held that the case came under the second paragraph of s. 110, Civ. P. Code, and that it was not necessary that at the time of presenting the application for leave to appeal, there should be a pending suit respecting other property of the value of Rs.10,000. *Srikrishna* v. *Kashmiro* (1913) 35 All. 445.

Directly or indirectly: No exact construction can be given to the word 'indirectly' for it must be a question of degree whether the relation between the decree and the claim in question is established with sufficient clearness, so as not to be too remote: *Udaychand* v. *Guzdar* (*supra*); *Alaggappa* v. *Nachiappan* (1922) 43 Mad. L.J. 728. Where the plaintiff claims a share (valued at less than Rs.10,000) in a property worth over Rs.10,000 and succeeds, the defendant can appeal to the Privy Council, but if the plaintiff fails, it would appear that he cannot. See the following observations of the Judicial Committee in *Macfarlane* v. *Leclaire* (1862) 15 Moo. P.C. 181 at p. 187:

> In determining the question of the value of the matter in dispute upon which the right to appeal depends, their Lordships consider the correct course to adopt is to look at the judgement as it affects the interests of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal. If their liability upon the judgement is of an amount sufficient to entitle them to appeal, they cannot be deprived of their right because the matter in dispute happens not to be of equal value to both parties; and, therefore, if the judgement had been in their favour, their adversary might possibly have had no power to question it by an appeal.

See *Muhammad Ashgar* v. *Abida Begum* (*supra*). But see *D'Silva* v. *D'Silva* (1904) 6 Bom. L.R. 403; *Raoji* v. *Laxmibai* (1920) 44 Bom. 104. But in *Lala Bhugwat* v. *Rai Pashupati Nath* (1906) 10 C.W.N. 564, it was held that for purposes of valuation under s. 596 of the Civ. P. Code (1882)—corresponding to s. 110 of the Code of 1908—the value of the subject matter in suit, in a suit for partition, is the value of the whole estate sought to partition, and not merely that of the particular share; and that the decree appealed from would 'involve directly or indirectly some claim or question to or respecting property' of that value within the meaning of the section.

Under s. 215, the Federal Legislature may make provisions (not inconsistent with any of the provisions of this Act) for conferring supplemental powers on the Federal Court.

207.—(1) An appeal shall lie to the Federal Court from a High Court in a Federated State on the ground that a question of law has been wrongly decided, being a question which concerns the interpretation of this Act or of an Order in Council made thereunder or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State, or arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature.

Appellate jurisdiction of Federal Court in appeals from High Courts in Federated States

(2) An appeal under this section shall be by way of special case to be stated for the opinion of the Federal Court by the High Court, and the Federal Court may require a case to be so stated, and may return any case so stated in order that further facts may be stated therein.

See W.P.Intr. 63; W.P.Prop. 156–57; J.C.R. 156. See notes to s. 205 above (appeal from High Court in British India). The appeal from the High Court of the Federated State may be by leave of the High Court itself in the shape of a special case to be stated by that court for the opinion of the Federal Court; or by the grant of leave to appeal by the Federal Court in the shape of a Letter of Request directed to the Ruler of the Federated State to be transmitted by him to the court concerned.

The questions of law must be one which (i) relates to the interpretation of the Act or of any Order in Council made thereunder; or (ii) concerns the extent of the legislative or executive authority vested in the Federation in virtue of the Instrument of Accession of that State; or (iii) arises under an agreement under Part VI of the Act (which deals with administrative relations between the Federation, Provinces, and the States), in relation to the administration in that State of a law of the Federal Legislature. These questions are among those which can be determined in the original jurisdiction of the Federal Court, when a State is a party to the dispute.

The Federal Court when it allows the appeal, is to remit the case to the court from which the appeal was brought, with a declaration of the proper judgement, decree, or order to be substituted and the court is to give effect to the decision: see s. 209. As regards enforcement of the decrees and orders of the Federal Court, see s. 210.

High Court in a Federated State: This means any court which His Majesty may, after communication with the Ruler of that State, declare to be a High Court: see s. 217.

208. An appeal may be brought to His Majesty in Council from a decision of the Federal Court—

Appeals to His Majesty in Council

(*a*) from any judgment of the Federal Court given in the exercise of its original jurisdiction in any dispute which concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or

executive authority vested in the Federation by virtue of the Instrument of Accession of any State, or arises under an agreement made under Part VI of this Act in relation to the administration in any State of a law of the Federal Legislature, without leave; and

(b) in any other case, by leave of the Federal Court or of His Majesty in Council.

This section provides for appeal with or without leave to the Privy Council from the decisions of the Federal Court. No leave is required in preferring an appeal from a judgement passed by the Federal Court in the exercise of its original jurisdiction under s. 204. In all other cases, leave either of the Federal Court or of the Privy Council is necessary.

Subject to the provisions of s. 206, the existing right of appeal to the Privy Council from the decisions of the High Courts remains.

Privy Council

The Judicial Committee of the Privy Council acts as a Supreme Court of Appeal from the Courts of the Dominions, India, the Colonies, and also from the Courts set up by the Crown in Protectorates and Mandated territories: see *Jerusalem and Jaffa District Governor* v. *Suleiman Murra* [1926] A.C. 321. Its jurisdiction is the ancient jurisdiction of the King in Council, to hear appeals from the Overseas Dependencies, which was in practice exercised by the legal members of the Council and was rendered statutory by the Judicial Committee Act, 1833 (amended by the Judicial Committee Act, 1844 and subsequent Acts) which set up a Judicial Committee to hear appeals under the Act itself or under the customary jurisdiction of the Privy Council.

The Committee is composed of all members of the Privy Council who have held high judicial office (including the seven Lords of Appeal in Ordinary), two salaried members with Indian legal experience, to whose salary India contributes, not more than seven judges or ex-judges of the Supreme Courts of the Dominions (or of any Colony that may be determined by Order in Council) who are Privy Councillors, and not more than two judges or ex-judges of a High Court in British India, who are Privy Councillors. The King may also appoint two other Privy Councillors with no restrictions as to their qualifications.

Appeals are either without the special leave of the Privy Council or with special leave. Appeals without special leave are regulated by Order in Council or local Acts. In all cases, however, the Crown retains the right to grant special leave to appeal unless that right has been expressly taken away by Imperial Legislation.[1] Under the Statute of Westminster, 1931, power to eliminate the appeal is given to all the Dominions. Appeals from British India are regulated by ss. 110–12 of the Code of Civil Procedure. In any special case, the High Court may certify that in its opinion, it is a fit case for appeal to the Privy Council and the Privy Council may also exercise the prerogative of the Crown and admit any appeal. The Privy Council is not a court of criminal appeal from India or the Colonies, and appeals are not allowed in criminal matters unless there has been a flagrant violation of justice. See *Knowles* v. *The King* [1930] A.C. 366, where an appeal was allowed from

[1] See Commonwealth of Australia Act, 1900, s. 104 and the South Africa Act, 1909, s. 106.

the decision of judge in Ashanti, who sitting without a jury, convicted and sentenced a man to death for murder without considering the possibility of manslaughter. But in criminal appeals, the Privy Council will not grant special leave to appeal unless some substantial or grave injustice has been done through disregard of all forms of legal process or some violation of the principles of natural justice or unless the question raised is of grave importance.[1] The rule is not to grant leave in criminal cases except where some clear departure from the requirements of justice is alleged to have taken place. The mere fact that there has been some mistake of law does not of itself afford sufficient ground for special leave. 'Misdirection as such, even irregularity as such, will not suffice ... There must be something which, in the particular case, deprives the accused of fair trial and the protection of law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.'[2] For cases of successful appeal in criminal cases, see *Rasbeharilal* v. *King Emperor* (1933) 50 T.L.R: (1933) 58 C.L.J. 300, where owing to the inability of one of the jurors to understand English, the Privy Council set aside the conviction and sentence, holding that the result of the trial was a miscarriage of justice. *Lawrence* v. *The King* (1933) A.C. 699 is an apt illustration of how the Judicial Committee fulfils its function of supervising the administration of criminal law. The trial judge in his charge to the jury, failed to give any direction at all as to the onus of proof, although counsel for the defence had stressed the point. In allowing the appeal, Lord Atkin said:[3]

> It is an essential principle of our criminal law that a criminal charge has to be established beyond reasonable doubt: and it is essential that the tribunal of fact should understand this. Unless the judge makes sure that the jury appreciate their duty in this respect, his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of guilty, given by a jury who have not taken this fundamental principle into account, is given in a case where the essential forms of justice have been disregarded.

The following judicial pronouncement by Viscount Haldane in *Hull* v. *McKenna and ors.*, (1926) I.R. 402, illustrates the functions of the Judicial Committee when hearing appeals from overseas Dominions, Colonies and India.

> We are not ministers in any sense; we are a Committee of Privy Councillors who are acting in the capacity of judges, but the peculiarity of the situation is this: it is a long-standing constitutional anomaly that we are really a Committee of the Privy Council giving advice to His Majesty but in a judicial spirit. We have nothing to do with politics or party considerations; we are really judges, but in form and in name we are the Committee of the Privy Council. The Sovereign gives the judgement himself and always acts upon the report which we make. Our report is made public before it is sent up to the Sovereign in Council. It is delivered here in a printed

[1] *Falkland Islands Co.* v. *R.* (1863) 1 Moo. P.C. (N.S.) 299; *Dal Singh* v. *King Emperor* 44 I.A. 137; *Mohindar Singh* v. *King Emperor* 50 I.A. 233.

[2] Per Lord Sumner in *Ibrahim* v. *The King* [1914] A.C. 599 at 615.

[3] At p. 707.

form ; it is a report as to what is proper to be done on the principles of justice ; and it is acted on by the Sovereign in full Privy Council so that you, see, in substance what takes place is a strictly judicial proceeding.

That being so, the next question is : what is the position of the Sovereign sitting in Council in giving formal effect to our advice and what are our functions in advising him ? The judicial Committee of the Privy Council is not an English body in any exclusive sense. It is no more an English body than an Indian body, or a Canadian body, or a South African body, or, for the future, an Irish Free State body. There sit among our members Privy Councillors, who may be learned judges of Canada,—there was one sitting with us last week—or from India, or we may have the Chief Justice and very often have had others, from the other Dominions, Australia and South Africa. I mention that for the purpose of bringing out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the Law. He may as well sit in Dublin, or at Ottawa, or in the South Africa, or in Australia, or in India, as he may sit here, and it is only for convenience and because we have a Court, and because the members of the Privy Council are conveniently here that we sit here: but the Privy Councillors from the Dominions may be summoned to sit with us, and then we sit as an Imperial Court which represents the Empire, and not any particular part of it. It is necessary to observe what effect that has upon the present situation. The Sovereign as the Sovereign of the Empire, has retained the prerogative of justice but by an Imperial Statute to which he has assented, that was modified as regards constitutional questions in the case of Australia. That is the only case that I need refer to where there has been any modification......... The Sovereign retains the ancient prerogative of being the Supreme tribunal of justice; I need not observe that the growth particularly in the Dominions, has led to a very substantial restriction of the exercise of the prerogative by the Sovereign on the advice of the Judicial Committee. It is obviously proper that the Dominions should more and more dispose of their own cases, and in criminal cases it has been laid down so strictly that it is only in most exceptional cases that Sovereign is advised to intervene. In other cases, the practice which has grown up, or the unwritten usage, which has grown up, is that the Judicial Committee is to look closely into the nature of the case, and, if in their Lordships' opinion, the question is one that can best be determined on the spot, then the Sovereign is not, as a rule, advised to intervene, nor is he advised to intervene normally,—unless the case is one involving some great principle or is of some very wide public interest. It is also necessary to keep a certain discretion, because when you are dealing with the Dominions you find that they differ very much. For instance, in States that are not unitary States—that is to say, States within themselves—questions may arise between the Central Government and the State, which when appeal is admitted, give rise very readily to questions which are apparently very small, but which may involve serious considerations, and there leave to appeal is given rather freely. In Canada there are a number of cases in which leave to appeal is given because Canada is not an unitary State, and because it is the desire of Canada itself that the

> Sovereign should retain the power of exercising his prerogative ; but that does not apply to internal disputes not concerned with constitutional questions, but relating to matters of fact. There the rule against giving leave to appeal from the Supreme Court of Canada is strictly observed where no great constitutional question, or question of law emerges. In the case of South Africa, which is a unitary State, Counsel will observe that the practice has become very strict. We are not at all disposed to advise the Sovereign, unless there is some exceptional question, such as the magnitude of the question of law is involved, or it is a question of public interest to give leave to appeal. It is obvious that the Dominions may differ in a certain sense among themselves. For instance, in India leave to appeal is more freely given than elsewhere, but the genesis of that is the requirements of India and the desire of the people of India. In South Africa, we take the general sense of that Dominion into account and restrict the cases in which we advise His Majesty to give leave to appeal. It becomes with the Dominions more and more or less and less as they please. We go upon the principles of autonomy on this question of exercising the discretion as to granting leave to appeal. It is within the Sovereign's power, but the Sovereign, looking at the matter, exercises this discretion.

Those observations should, however, now be read subject to the provisions of the Statute of Westminster and the Acts passed in the Dominions under the authority of that Statute.

Contempt

The authorities, on the question how far the Privy Council will interfere in cases where there is an order by a court of competent jurisdiction in a matter of contempt, are not uniform. In *Rainey* v. *Justices of Sierra Leone*, (1852) 8 Moo. P.C. 47 at 54, Lord Cranworth said 'In this country, every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court. We do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders'. In *McDermott* v. *Judges of British Guiana*, (1868) L. R. 2 P.C. 341, the Privy Council arrived at the same decision. But in *Surendranath Banerjee* v. *Chief Justice and Judges of the High Court of Bengal*, (1883) 10 I.A. 171, on an appeal from a committal for contempt the Privy Council examined the article complained against, and held that as it was clearly a contempt of court, the case was not a proper one for appeal to His Majesty. In *Mcleod* v. *St. Aubny*, [1899] A.C. 549, the Judicial Committee allowed an appeal from an order committing for contempt, with costs against the respondents. In *Ambard* v. *A–G for Trinidad and Tobago*, [1936] A.C. 322, it was held that His Majesty in Council could give leave to appeal against orders of Court of Record overseas imposing penalties for contempt of court. In this case Lord Atkin said at p. 329.

> There seems no reason for limiting in this respect the general prerogative of the Crown to review all judicial decisions of Courts of Record in the dominions overseas, whether civil or criminal, though the discretion as to the exercise of the prerogative may have to be carefully guarded. . . In such cases the discretionary power of the Board will no doubt be exercised with great care. Every one will recognise the importance of maintaining the authority of the Courts in restraining and punishing interferences with the administration of justice, whether they be interferences in particular

civil or criminal cases, or take the form of attempts to depreciate the authority of the Courts themselves. It is sufficient to say that such interferences, when they amount to contempt of court, are quasi-criminal acts and orders punishing them should, generally speaking be treated as orders in criminal cases, and leave to appeal against them should only be granted on the well-known principles on which leave to appeal in criminal cases is given.

Under s. 110 (b) (iii), the prerogative right of His Majesty to grant special leave to appeal cannot be curtailed by any Legislature in India, unless expressly permitted by any subsequent provisions of the Act.

Form of judgment on appeal

209.—(1) The Federal Court shall, where it allows an appeal, remit the case to the court from which the appeal was brought with a declaration as to the judgment, decree or order which is to be substituted for the judgment, decree or order appealed against, and the court from which the appeal was brought shall give effect to the decision of the Federal Court.

(2) Where the Federal Court upon any appeal makes any order as to the costs of the proceedings in the Federal Court, it shall, as soon as the amount of the costs to be paid is ascertained, transmit its order for the payment of that sum to the court from which the appeal was brought and that court shall give effect to the order.

(3) The Federal Court may, subject to such terms or conditions as it may think fit to impose, order a stay of execution in any case under appeal to the Court, pending the hearing of the appeal, and execution shall be stayed accordingly.

See W.P.Prop. 160; J.C.R. 326; also notes at the head of this Chapter under EXECUTIVE AUTHORITY OF THE FEDERAL COURT; and s. 210 below. The Federal Court will have no machinery to enforce its decisions.

Enforcement of decrees and orders of Federal Court and orders as to discovery, etc.

210.—(1) All authorities, civil and judicial, throughout the Federation, shall act in aid of the Federal Court.

(2) The Federal Court shall, as respects British India and the Federated States, have power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of court, which any High Court in British India has power to make as respects the territory within its jurisdiction, and any such orders, and any orders of the Federal Court as to the costs of and incidental to any proceedings therein,

shall be enforceable by all courts and authorities in every part of British India or of any Federated State as if they were orders duly made by the highest court exercising civil or criminal jurisdiction, as the case may be, in that part.

(3) Nothing in this section—

(a) shall apply to any such order with respect to costs as is mentioned in subsection (2) of the last preceding section ; or

(b) shall, as regards a Federated State apply in relation to any jurisdiction exercisable by the Federal Court by reason only of the making by the Federal Legislature of such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the Federal Court.

See W.P. Prop. 160 ; J.C.R. 326 ; and s. 209 above. Rules regulating the practice and procedure of the Federal Court are to be made under s. 214 by the court with the approval of the Governor-General.

Contempt of court : The High Court, as a Court of Record, has an inherent power to punish summarily by imprisonment contempts of court by publication of a libel out of court, when the court is not sitting : see *In the matter of William Taylor* (1869) 26 C.L.J. 345 ; *In the matter of Banks and Fenwick* (1869) 26 C.L.J. 401 ; *Surendranath Banerjee* v. *The Chief Justice and Judges of the High Court of Bengal* (1884) 10 Cal. 109 ; 10 I.A. 171. As to contempt of court by scandalizing the court itself, see *In re Motilal Ghose* (1918) 45 Cal. 169 ; 21 C.W.N. 1161 ; *In re Advocate of Allahabad* (1934) 33 All. L.J. 125 ; *In the matter of Tushar Kanti Ghose* (1935) 39 C.W.N. 770.

211. Where in any case the Federal Court require a special case to be stated or re-stated by, or remit a case to, or order a stay of execution in a case from, a High Court in a Federated State, or require the aid of the civil or judicial authorities in a Federated State, the Federal Court shall cause letters of request in that behalf to be sent to the Ruler of the State, and the Ruler shall cause such communication to be made to the High Court or to any judicial or civil authority as the circumstances may require. Letters of request to Federated States

See W.P. Prop. 157 ; J.C.R. 325 ; s. 205 and notes thereto under CERTIFICATE.

By s. 207(2), it is provided on appeal to the Federal Court from a High Court in a Federated State shall be by way of special case to be stated by the High Court for the opinion of the Federal Court. In J.C.R. 325, it is provided that the granting of leave to appeal by the Federal Court will be in the form of a Letter of Request directed to the Ruler of the State to be transmitted by him to the court concerned.

Law declared by Federal Court and Privy Council to be binding on all courts

212. The law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on, and shall be followed by, all courts in British India, and so far as respects the application and interpretation of this Act or any Order in Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State, in any Federated State.

The jurisdiction of the Privy Council in relation to the States will be based upon the voluntary act of the Rulers themselves, i.e. their Instruments of Accession.

Power of Governor-General to consult Federal Court

213.—(1) If at any time it appears to the Governor-General that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may in his discretion refer the question to that court for consideration, and the court may, after such hearing as they think fit, report to the Governor-General thereon.

(2) No report shall be made under this section save in accordance with an opinion delivered in open court with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this subsection shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion.

See W.P. Prop. 161; J.C.R. 327. See Introduction to this Chapter under ADVISORY JURISDICTION. The Judicial Committee in *Attorney-General, Ontario* v. *Attorney-General, Canada* [1912] A.C. 571 pointed out the mischief and the inconvenience which might arise from an indiscriminate and injudicious use of the power of the Executive Government to seek the opinion of the court. Any issue which might come up on appeal should not be dealt with on reference. For cases of reference to the Privy Council under a similar provision, see *In re Wallace* (1886) 1 P.C. 283; *In re Pollard* (1887) 2 P.C. 106; *Attorney-General of Queensland* v. *Gibbon* (1887) 12 App. Cas. 442; *Emerson* v. *Judges of Supreme Court* 8 Moo. P.C. 157; *Smith* v. *Justices of Sierra Leone* 7 Moo. P.C. 174. It is to be noted that any issue as to the removal of a Federal or a High Court Judge under ss. 200(2) (*b*) and 220(2) (*b*) will have to be referred to the Privy Council.

In his discretion: See Introduction to Part II, Chapter II, under this title.

Rules of court, etc.

214.—(1) The Federal Court may from time to time, with the approval of the Governor-General in his discretion, make rules of court for regulating generally the practice and procedure of the court, including rules as to the persons

practising before the court, as to the time within which appeals to the court are to be entered, as to the costs of and incidental to any proceedings in the court, and as to the fees to be charged in respect of proceedings therein, and in particular may make rules providing for the summary determination of any appeal which appears to the court to be frivolous or vexatious or brought for the purpose of delay.

(2) Rules made under this section may fix the minimum number of judges who are to sit for any purpose, so however that no case shall be decided by less than three judges :

Provided that, if the Federal Legislature makes such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the court, the rules shall provide for the constitution of a special division of the court for the purpose of deciding all cases which would have been within the jurisdiction of the court even if its jurisdiction had not been so enlarged.

(3) Subject to the provisions of any rules of court, the Chief Justice of India shall determine what judges are to constitute any division of the court and what judges are to sit for any purpose.

(4) No judgment shall be delivered by the Federal Court save in open court and with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this subsection shall be deemed to prevent a judge who does not concur from delivering a dissenting judgment.

(5) All proceedings in the Federal Court shall be in the English language.

See W.P. Prop. 162. In J.C.R. 325, it is stated that 'the Federal Court ought to have summary power of disposing of appeals or applications for leave to appeal in any case where they appear to be frivolous or vexatious or brought only for the purposes of delay'.

Cl. (2) : See Introduction to this Chapter under SUPREME COURT. J.C.R. 329 stated that there was much to be said for the establishment of a Court of Appeal for the whole of British India but this could be most conveniently effected by an extension of the jurisdiction of the Federal Court, instead of establishing a Supreme Court in addition to the Federal Court. It was suggested that the Federal Court could sit in two Chambers, one dealing with federal cases and the other with British India appeals. By s. 206(2), the Federal Legislature might on conditions therein provided limit or abolish direct appeals in civil cases to the Privy Council.

215. The Federal Legislature may make provision by Act for conferring upon the Federal Court such supplemental powers not inconsistent with any of the provisions Ancillary powers of Federal Court

of this Act as may appear to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by or under this Act.

An Act of the Federal Legislature containing provisions inconsistent with any of the provisions of this Act will be to that extent void, and may be so declared by the Federal Court.

Expenses of Federal Court

216.—(1) The administrative expenses of the Federal Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the revenues of the Federation, and any fees or other moneys taken by the court shall form part of those revenues.

(2) The Governor-General shall exercise his individual judgment as to the amount to be included in respect of the administrative expenses of the Federal Court in any estimates of expenditure laid by him before the Chambers of the Federal Legislature.

See s. 33(3). Estimates for expenditure charged upon the federal revenues are not to be submitted to the vote of the Legislature. See s. 34(1).

Construction of references to High Courts in States

217. References in any provision of this Part of this Act to a High Court in a Federated State shall be construed as references to any court which His Majesty may, after communication with the Ruler of the State, declare to be a High Court for the purposes of that provision.

Savings

218. Nothing in this chapter shall be construed as conferring, or empowering the Federal Legislature to confer, any right of appeal to the Federal Court in any case in which a High Court in British India is exercising jurisdiction on appeal from a court outside British India, or as affecting any right of appeal in any such case to His Majesty in Council with or without leave.

The jurisdiction of the Federal Court is statutory. Where the High Courts in exercise of powers under the Foreign Jurisdiction Act, 1890, hear appeals from Courts outside British India, a further appeal in respect of these matters does not lie to the Federal Court. The High Courts hear appeals from the Court of the Consul-General (Political Resident) for the Persian Gulf, Coast Islands (Bombay) and the Kashgar Consular Court (Lahore). See old s. 109(1). Nothing in the Act affects any right

of appeals in such causes, with or without special leave, to the Privy Council.

Under s. 110 (*b*) (iii) no legislature in India can make any laws derogating from the prerogative right of His Majesty to grant special leave to appeal from any court, unless expressly permitted by any subsequent provision of this Act. See notes to s. 206(2).

Orders in Council: By the (Commencement and Transitory Provisions) Order, 1936, it was laid down that the provisions of Chapter I of Part IX (Federal Court) were to come into force on such date as His Majesty in Council may hereafter appoint.

By the (Federal Court) Order, 1936, it was provided that the provisions of Chapter I of Part IX (except ss. 206 and 215) were to come into force on October 1, 1937, and that s. 205 (relating to the Appellate Jurisdiction of the Federal Court in Appeal from High Court in British India) was to come into force on April 1, 1937. This Order provided for the salary, pension and allowances of the Chief Justice and the other judges of the Federal Court: the salary of the former being Rs.7,000 per month and of the latter Rs.5,500.

By the (Federal Court) Order, 1937, it was laid down that the provisions of s. 215 (relating to the ancillary powers of the Federal Court) were to come into force on July 29, 1937, the date of the Order. The Order provided for leave, vacation, passages and allowances of the Chief Justice and other judges of the Federal Court, modifying paragraphs 2, 4–10 of the (Federal Court) Order, 1936.

CHAPTER II

THE HIGH COURTS IN BRITISH INDIA

INTRODUCTION

Under the old constitution, the administrative machinery of all the High Courts in India (except the Calcutta High Court) was subject to the control of the Provincial Governments and Legislatures. The Joint Parliamentary Committee remarked that there was evidence that the Legislatures have from time to time tended to assert their powers in a way which might under the new constitution affect the efficiency of the High Courts. So the White Paper proposed that under the new constitution, any expenditure certified by the Governor after consultation with his ministers, to be required for the expenses of the High Court is not to be submitted to the vote of the Legislature, though open to discussion. Such expenditure is under s. 78(3)(*e*) to be charged on the revenues of the Province. The Simon Commission was of opinion that the administrative control of all the High Courts should be placed in the hands of the central Government and that the income and expenditure in connexion with these courts should be included in the central Government's Budget,[1] as in the case of the Calcutta High Court. In consequence of the historical connexion of the Calcutta High Court and the Government of India, the former was so long under the administrative control of the latter, unlike the other High Courts. The financial requirements of the Calcutta High Court were placed on the central Budget though the actual cost was paid from the revenues of Bengal. The Statutory Commission was strongly of the opinion that the independence and integrity of the High Courts in India should be protected from any chance of political pressure or from being controlled by the Provincial Legislatures. But the Joint Parliamentary Committee was of opinion that this desideratum would be served by making the High Courts provincial institutions and providing that the expenditure should be fixed by the Governor in his individual judgement and be made a charge on the provincial revenues and so non-votable. The Federal Legislature, under the Federal Legislature List [2] will have an exclusive power to make laws respecting the jurisdiction and powers of all courts in British India except the Federal Court, in regard to the subjects within its exclusive competency. The Provincial Legislatures have similar exclusive powers [3] touching the jurisdiction and powers of all courts within the Province in respect of matters within their exclusive competence. These powers might be used by the Federal or by a Provincial Legislature to deprive a High Court of much of its jurisdiction and powers and to transfer the same to courts of inferior status, and thus to lower the prestige and influence of the High Court. This is no doubt possible under the new law, but the Joint Committee thinks that neither the Federal nor any Provincial Legislature will willingly do anything calculated to prejudice the dignity and status of a High Court. Further, as a safeguard, the Governor-General or the Governor has been directed in their Instrument

[1] Report, Vol. II, pars. 341–49.

[2] List I, Seventh Schedule, item 53.

[3] See List II, item 2.

of Instructions that they are not to give assent to, but must reserve for the signification of His Majesty's pleasure, any Bill which in his opinion would, if passed into law, so derogate from the power of the High Court as to endanger the position which it is by this Act designed to fill.

So the new Act provides that all the High Courts without exception will be under the Provincial administrative control.

Judges

The judges, under s. 102 of the old Act, held office during His Majesty's pleasure. Under the new Act, they hold office during good behaviour. S. 202(2) Prov. (6) in case of a judge of the Judicial Court and s. 220(2) Prov. (6) in case of a High Court judge provide that a judge may be removed for misbehaviour. But ordinarily under the new Act, every person holding a civil post under the Crown in India holds office during His Majesty's pleasure. See notes under s. 200(2) Prov. (b) for the reason for this exceptional rule in case of the judge. Salaries and allowances of judges are to be fixed by Order in Council, and neither salary of a judge nor his rights in respect of leave of absence or pension may be varied to his disadvantage after his appointment. See Orders in Council under s. 231.

Superintendence

A change has been made in the new Act[1] making quite clear the nature and extent of the superintendence vested in a High Court over the subordinate courts of the Province. The administrative jurisdiction conferred does not cover any judicial jurisdiction over the inferior courts. This matter was unsettled owing to conflicting decisions.

Revenue matters

The High Court is not to have any original jurisdiction in revenue matters, as under the old Act.[2] But it is now provided that the Federal or the Provincial Legislature with the previous sanction of the Governor-General or a Governor in his discretion, may pass an Act giving such jurisdiction. Under s. 296, the Governor may constitute a Court of Appeal in revenue matters. The jurisdiction of the High Court in a Province may, by agreement with the approval of His Majesty in Council, be extended beyond the Province. His Majesty may by Letters Patent constitute a High Court in a Province or, where there are two High Courts in a Province, amalgamate them. But this may only be done after the Provincial Legislature has presented an address in that behalf to the Governor for submission to His Majesty.

Meaning of 'High Court'

219.—(1) The following courts shall in relation to British India be deemed to be High Courts for the purposes of this Act, that is to say, the High Courts in Calcutta, Madras, Bombay, Allahabad, Lahore and Patna, the Chief Court in Oudh, the Judicial Commissioner's Courts in the Central Provinces and Berar, in the North-West Frontier Province and in Sind, any other court in British India constituted or reconstituted under this chapter as a High Court, and any other comparable court in British India which His Majesty in Council may declare to be a High Court for the purposes of this Act :

1 S. 224.

2 Old s. 106(2).

Provided that, if provision has been made before the commencement of Part III of this Act for the establishment of a High Court to replace any court or courts mentioned in this subsection, then as from the establishment of the new court this section shall have effect as if the new court were mentioned therein in lieu of the court or courts so replaced.

(2) The provisions of this chapter shall apply to every High Court in British India.

By s. 229, His Majesty by Letters Patent may constitute a new High Court or reconstitute existing High Courts.

Constitution of High Courts

220.—(1) Every High Court shall be a court of record and shall consist of a chief justice and such other judges as His Majesty may from time to time deem it necessary to appoint:

Provided that the judges so appointed together with any additional judges appointed by the Governor-General in accordance with the following provisions of this chapter shall at no time exceed in number such maximum number as His Majesty in Council may fix in relation to that court.

(2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years:

Provided that—

(*a*) a judge may by resignation under his hand addressed to the Governor resign his office;

(*b*) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

(3) A person shall not be qualified for appointment as a judge of a High Court unless he—

(*a*) is a barrister of England or Northern Ireland, of at least ten years' standing, or a member of the Faculty of Advocates in Scotland of at least ten years' standing; or

(*b*) is a member of the Indian Civil Service of at least ten years' standing, who has for at least three years served as, or exercised the powers of, a district judge; or

(c) has for at least five years held a judicial office in British India not inferior to that of a subordinate judge, or judge of a small cause court; or

(d) has for at least ten years been a pleader of any High Court, or of two or more such Courts in succession:

Provided that a person shall not, unless he is, or when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader, be qualified for appointment as Chief Justice of any High Court constituted by letters patent until he has served for not less than three years as a judge of a High Court.

In computing for the purposes of this subsection the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which the person has held judicial office after he became a barrister, a member of the Faculty of Advocates, or a pleader, as the case may be, shall be included.

(4) Every person appointed to be a judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act.

Under the Act of 1919, judges hold office during His Majesty's pleasure but under the provisions of this section, they will hold office during good behaviour. This subsection lays down the procedure for the removal of judges on the grounds mentioned herein. A judge can only be removed, if on His Majesty's reference, the Judicial Committee reports that the judge on any such ground should be removed.

Tenure during pleasure is the ordinary tenure of public servants [1] and tenure during good behaviour is confined to persons holding the office of the Federal Court or High Court judges. The difference between the two forms of tenure is that a person during good behaviour cannot be removed from his office except for such misconduct as would, in the opinion of a court of justice, justifying his removal; whilst a person holding good pleasure can be removed without any reason for his removal being assigned.[2] See the Government of India (High Court Judges) Order, 1937, fixing the maximum number of judges under Cl. (1) of the section.

221. The judges of the several High Courts shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling Salaries, etc. of judges

1 See notes to s. 200(2) Prov. and s. 240.

2 See *Wills* v. *Gipps* (1846) 6 State Trials (N.S.) 311.

upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

Provided that neither the salary of a judge, nor his rights in respect of leave of absence or pension, shall be varied to his disadvantage after his appointment.

See s. 201 (Salaries of Judges of the Federal Court) and notes thereto. See the Government of India (High Court Judges) Order, 1937, the (High Court Judges) (Amendment) Order, 1937, and the (High Court Judges) (Amendment) Order, 1938. These Orders provide for the number, salaries, allowances, leaves, passage and pension of the Chief Justices, judges of the various High Courts, Chief Courts, and Judicial Commissioner's Courts.

Temporary and additional judges

222.—(1) If the office of chief justice of a High Court becomes vacant, or if any such chief justice is by reason of absence, or for any other reason unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the chief justice has resumed his duties, as the case may be, be performed by such one of the other judges of the court as the Governor-General may in his discretion think fit to appoint for the purpose.

(2) If the office of any other judge of a High Court becomes vacant, or if any such judge is appointed to act temporarily as a chief justice, or is by reason of absence, or for any other reason, unable to perform the duties of his office, the Governor-General may in his discretion appoint a person duly qualified for appointment as a judge to act as a judge of that court, and the person so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, be deemed to be a judge of that court until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the permanent judge has resumed his duties.

(3) If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such court it appears to the Governor-General that the number of the judges of the court should be for the time being increased, the Governor-General in his discretion may, subject to the foregoing provisions of this chapter with respect to the maximum number of judges, appoint persons duly qualified for appointment as judges to be additional judges of the court for such period not exceeding two years as he may specify.

A vacancy can only occur in the office of a judge appointed by the Crown and not of a judge appointed under this section.[1] There is no limit of time mentioned in this section within which the appointment of an acting judge is to be made. Such an appointment, therefore, is not invalid, because it is not made immediately upon or within a reasonable time after the occurrence of the vacancy which it supplied.[2]

223. Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the court, including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be the same as immediately before the commencement of Part III of this Act. Jurisdiction of existing High Courts

Jurisdiction is a content of the judicial power. It is the power of a court to entertain an action, suit or other proceedings. The existing powers of the High Court includes general appellate jurisdiction in all matters decided by the Civil and Criminal Courts within the limits assigned by the several Letters Patent. The original jurisdiction of the High Courts is limited by the Letters Patent to matters in which the subject matter of the suit or the character of the parties, fall under certain specified heads; but the appellate jurisdiction has no such limits. Provisions as to original, appellate and admiralty jurisdictions are made in the different Letters Patent creating High Courts.

As regards the law to be administered in these courts, see ss. 292 and 293 and notes thereunder.

224.—(1) Every High Court shall have superintendence over all courts in India for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,— Administrative functions of High Courts

(*a*) call for returns;

(*b*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts;

(*c*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; and

(*b*) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts:

[1] *Queen Empress* v. *Gangaram* (1893) 16 All. 136.

[2] See *Balwant Singh* v. *Rani Kishori* (1897) 20 All. 267.

Provided that such rules, forms and tables shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(2) Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.

In this Act, the existing jurisdiction and powers of High Courts are maintained, except that the powers of the High Courts under s. 107 of the old Act over the subordinate courts, which have been interpreted by certain High Courts as conferring upon them a wide juridical competence, have been restricted to administrative powers, and not any juridical jurisdiction. In certain cases under the old law, it was held that the High Court under its general powers of superintendence could interfere judicially with orders of the subordinate courts. In *Sardhari Sah* v. *Hukum Chand Sah* (1914) 41 Cal. 876, it was held that the court, under the general powers of superintendence (under the Letters Patent) could revise an order of the subordinate judge, which it could not do under s. 115 of the Civil Procedure Code. 'But we have general power of superintendence over the subordinate courts under the Charter,' observed Coxe, J,[1] 'and think this is a case in which the power might fitly be exercised. Personally, I should be very loath to hold that we can alter wrong judicial orders under that power and incline to the views stated in *Tej Ram* v. *Harsukh* (1895) 1 All. 101. That is an evil which this Court, in my opinion, is entitled to remedy in the exercise of its power of superintendence'. The Court, however, refused to interfere in *Corporation of Calcutta* v. *Bhupati Roy Chowdhury* (1899) 26 Cal. 74 under a similar provision of the Indian High Courts Act. *In the Matter of the Petition of Madho Ram* (1899) 21 All. 181, it was held that they could not interfere when the sole ground upon which the order was sought, was that the decision of the lower court was against the weight of evidence. But Cl. (2) of this section makes it quite clear that the law does not confer juridical jurisdiction to the High Court under its general powers of superintendence, but only administrative control.

The meaning of the words, 'jurisdiction and powers' of courts which are found in all the three lists in the Seventh Schedule,[2] was thus explained in a memorandum submitted by the Secretary of State before the Joint Select Committee:

> The phrase 'jurisdiction, powers and authority' has a long history reaching back to the Regulating Act of 1773, and it is employed in subsection (1) (*a*) of s. 106 of the present Government of India Act to indicate, along with the power to establish a High Court, the whole scope of the Letters Patent. The Letters Patent themselves indicate the distinction which is to be drawn at least between, on the one hand 'jurisdiction' and on the other 'powers and authority'; the broad distinction seems to be that 'jurisdiction' indicates juridical competence, and 'powers and authority', administrative. The Letters Patent indicate, for instance, as regards

[1] At p. 885.

[2] List I, item 53, List II, item 2, and List III, item 15.

civil jurisdiction, that there is a competence to try and determine, whether originally or an appeal, matters arising in issue between parties. The Criminal jurisdiction is a competence to try all persons brought before the court in due course of law and, of course, to hear appeals from the orders of courts exercising a subordinate criminal jurisdiction. The Letters Patent, however, do not set out to describe or specify the content of the jurisdiction. The Law to be administered by the High Court is left to the competent legislative authority in India and the scope of the appellate power of the High Court is also left to the operation of existing legislative provision in India or to subsequent provision, which may hereafter be made by competent legislative authority in India.

The distinction made explicitly or implicitly in Letters Patent between 'jurisdiction' on the one hand and 'powers and authority' on the other, is clear from the 'powers' therein given. They include, for instance, powers to appoint officers of the court itself, powers to admit advocates, vakils and attorney and to make rules for their qualification, removal and suspension ; powers to regulate their proceedings and powers to delegate duties of a judicial, quasi-judicial or non-judicial nature to any Registrar, or Master or other official of the court. The powers conferred on the High Court by the Government of India Act relate not merely to administrative control over subordinate courts, but also to a wide juridical competence. But the provision of this section leaves no doubt that it does not confer juridical jurisdiction, but only administrative control.

Transfer of certain cases to High Court for trial

225.—(1) If on an application made in accordance with the provisions of this section a High Court is satisfied that a case pending in an inferior court, being a case which the High Court has power to transfer to itself for trial, involves or is likely to involve the question of the validity of any Federal or Provincial Act, it shall exercise that power.

(2) An application for the purposes of this section shall not be made except, in relation to a Federal Act, by the Advocate-General for the Federation and, in relation to a Provincial Act, by the Advocate-General for the Federation or the Advocate-General for the Province.

Under Cl. 13 of the Letters Patent (Calcutta, Bombay and Madras) the High Court has in its extraordinary original jurisdiction, power to remove and try any suit within the jurisdiction of any subordinate court either by agreement of parties or for purposes of justice. Under s. 24 of the Indian Code of Civil Procedure, 1908, the High Court has power to withdraw any suit pending in any subordinate court and try or dispose of the same. Under this section, where there is any suit pending before a subordinate court involving or likely to involve any question as to the validity of any Federal or Provincial Act, the High Court may on the application of the Advocate General of the Federation or of the Province transfer the same to itself for disposal. Such important matters should not be left for decision to an inferior court.

Jurisdiction in revenue matters

226.—(1) Until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

(2) A Bill or amendment for making such provision as aforesaid shall not be introduced into or moved in a Chamber of the Federal or a Provincial Legislature without the previous sanction of the Governor-General in his discretion or, as the case may be, of the Governor in his discretion.

Under s. 106(2) of the old Act, the High Courts had not and could not exercise any original jurisdiction in revenue matters. Under the present section, this disability may be removed by the appropriate Legislature, but a Bill with this object cannot be introduced or moved in the Legislature without the previous sanction of the Governor-General or the Governor. The principle underlying this bar is that matters likely to affect the liability for, or the amount of, Government land revenue, should be adjudicated upon by revenue officers, who have better acquaintance with such matters and with a procedure more elastic and summary than that of the Ordinary Civil Courts.

In re Adhar Chandra Shaw (1873) 11 Bengal Law Reports 250, it was held that the court could not issue a mandamus requiring the Board of Revenue to prescribe rules fixing liquor license fees. But in *Alcock Ashdown & Co.* v. *Chief Revenue Authority of Bombay* (1923) 47 Bom. 742, the Privy Council allowed mandamus on the revenue authorities to carry out the procedure of the income tax legislation. The section does not apply to land revenue only, as was suggested in *Collector of Sea Customs* v. *Panniar Chithambaram* (1874) 1 Mad. 89. See also *Spooner* v. *Juddow* (1850) 4 Moo. Ind. App. 353.

Proceedings of High Courts to be in English

227. All proceedings in every High Court shall be in the English language.

See notes to s. 39.

Expenses of High Courts

228.—(1) The administrative expenses of a High Court including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court and the salaries and allowances of the judges of the court shall be charged upon the revenues of the Province, and any fees or other moneys taken by the court shall form part of those revenues.

(2) The Governor shall exercise his individual judgment as to the amount to be included in respect of such expenses as aforesaid in any estimates of expenditure laid by him before the Legislature.

See Introduction to this Chapter. The High Court though under the administrative control of the Provincial Government must be kept free from political pressure by the Provincial Legislature or Executive. The Governor in his individual judgement is to settle the amount necessary for the administrative expenses of the High Court. Such expenses are charged on the Provincial revenues [1] and are non-votable. But discussion on the expenditure is allowed.[2]

229.—(1) His Majesty, if the Chamber or Chambers of the Legislature of any Province present an address in that behalf to the Governor of the Province for submission to His Majesty, may by letters patent constitute a High Court for that Province or any part thereof or reconstitute in like manner any existing High Court for that Province or for any part thereof, or, where there are two High Courts in that Province, amalgamate those courts.

Power of His Majesty to constitute or reconstitute High Court by letters patent

(2) Where any Court is reconstituted, or two Courts are amalgamated, as aforesaid, the letters patent shall provide for the continuance in their respective offices of the existing judges, officers and servants of the Court or Courts, and for the carrying on before the reconstituted Court or the new Court of all pending matters, and may contain such other provisions as may appear to His Majesty to be necessary by reason of the reconstitution or amalgamation.

Under s. 109(1) of the old Act, the Governor-General in Council had the power to alter the local limits of jurisdiction of any High Court and could authorize the court to exercise jurisdiction in any part of British India outside the limits of its jurisdiction as originally constituted, and also, in respect of a British subject, in any part of India outside British India. By s. 229, His Majesty may constitute a new High Court or re-constitute an existing one or amalgamate two existing ones, provided an address to this effect is presented by the Legislature concerned to the Governor for submission to His Majesty.

230.—(1) His Majesty in Council may, if satisfied that an agreement in that behalf has been made between the Governments concerned, extend the jurisdiction of a High Court in any Province to any area in British India not forming part of that Province, and the High Court shall thereupon have the same jurisdiction in relation to that area as it has in relation to any other area in relation to which it exercises jurisdiction.

Extra-provincial jurisdiction of High Courts

(2) Nothing in this section affects the provisions of any law or letters patent in force immediately before the

[1] See s. 78(3) (*d*). [2] See s. 79(1).

commencement of Part III of this Act empowering any High Court to exercise jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of any Province.

(3) Where a High Court exercises jurisdiction in relation to any area or areas outside the Province in which it has its principal seat, nothing in this Act shall be construed—

(*a*) as empowering the Legislature of the Province in which the Court has its principal seat to increase, restrict or abolish that jurisdiction; or

(*b*) as preventing the Legislature having power to make laws in that behalf for any such area from passing such laws with respect to the jurisdiction of the court in relation to that area as it would be competent to pass if the principal seat of the court were in that area.

This section empowers His Majesty to extend the jurisdiction of a High Court to an area in British India outside the Province, provided the Governments concerned agree to this course. But the existing law empowering the High Court to exercise jurisdiction in respect of more than one Province or in respect of a Province and an area not forming part of a Province is preserved.[1]

Saving and definitions

231.—(1) Any judge appointed before the commencement of Part III of this Act to any High Court shall continue in office and shall be deemed to have been appointed under this Part of this Act, but shall not by virtue of this Act be required to relinquish his office at any earlier age than he would have been required so to do, if this Act had not been passed.

(2) Where a High Court exercises jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of a Province, references in this chapter to the Governor in relation to the judges and expenses of a High Court and references to the revenues of the Province shall be construed as references to the Governor and the revenues of the Province in which the Court has its principal seat, and the reference to the approval by the Governor of rules, forms and tables for subordinate courts shall be construed as a reference to the approval thereof by the Governor of the Province in which the subordinate court is situate, or, if it is situate

[1] See old s. 109.

in an area not forming part of a Province by the Governor-General.

A judge of a High Court appointed before Part III of the Act comes into force is to be deemed to have been appointed under this Act but the age-limit under the old Law stands. If the High Court has jurisdiction over more than one Province, the Governor of the Province where the court has its principal seat has the power of fixing the amount for its administrative expenditure, which is to be placed on the Budget of that Province.

Orders in Council

The (High Court Judges) Order, 1937 was made under ss. 220(1) and 221, providing for the number of judges, their pay, allowances, etc. The (High Court Judges) (Amendment) Order, 1937 was made modifying paragraph 2(1), and the First Schedule of the principal Order.

The (High Court Judges) (Amendment) Order, 1938 was made modifying paragraph 27 of the principal Order, so as to ensure that the conditions of service of judges appointed before April 1, 1937, should remain unchanged.

PART X

THE SERVICES OF THE CROWN IN INDIA

CHAPTER I

DEFENCE SERVICES

INTRODUCTION

The executive authority of the Federation vested in the Governor-General as the King's representative includes the superintendence, direction and control of the military government of India.[1] The White Paper proposed that the Governor-General is himself to direct and control the administration of the departments of Defence, External Affairs, and Ecclesiastical Affairs. There will be reserved departments, not within the sphere of ministerial responsibility, all other departments being in the hands of responsible ministers, subject to the retention by the Governor-General of special powers and responsibilities. So the system of government now adopted at the centre involves a *system of dyarchy*.[2] The important department of Defence is to be in the hands of the Governor-General to be personally administered by him on his sole responsibility.[3] To assist the Governor-General in the administration of these three reserved departments, it is provided that there are to be not more than three Counsellors to be appointed by him, whose salaries and conditions of service will be prescribed by Order in Council.[4] The Counsellors are to be *ex-officio* members of the Federal Legislature with the right to speak, though not the right to vote.[5]

In the vital matter of defence, it is essential that the department should be able to secure that its views prevail in the case of a difference of opinion. In such case, the final responsibility for a decision must rest with the Governor-General. His views must prevail, and he must have adequate means of giving effect to them. The Military Finance and the Military Accounts departments were previously subordinate to the Finance department of the central Government and not to the Army department; but as the Governor-General is now responsible for military expenditure, both these departments are now to be brought under the department of Defence.

Although the reserved departments will be administered by the Governor-General on his sole responsibility, it would be impossible in practice to conduct the affairs of these departments in isolation from the other activities of the Federal Government, and undesirable that he should do so, even if it were possible; for the defence of India must to an increasing extent be the concern of the Indian people. As stated in W. P. Intr. 23:

> A prudent Governor-General would therefore keep his ministers and the advisors whom he has selected to assist him in the reserved departments in the closest contact; and, without blurring the line which will necessarily divide on the one hand his personal responsi-

[1] See s. 33, old Act.
[2] J.C.R. 174, 188.
[3] W.P. Prop. 11, J.C.R. 172.
[4] W.P. Prop. 12 and s. 11.
[5] W.P. Intr. 15, J.C.R. 172, s. 21 new Act. See s. 11(2) above.

bility for the reserved departments, and, on the other hand, the responsibility of ministers to the Legislature for the matters entrusted to their charge, he would so arrange the conduct of executive business that he himself, his counsellors and his responsible ministers are given the fullest opportunity of mutual consultation and discussion on all matters—and there will necessarily be many such—which call for co-ordination of policy.

The Federal department of Finance in particular should be kept in touch with the department of Defence, and as provided in paragraph XIX of the Instrument of Instructions to the Governor-General, the Federal ministry, and in particular, the Finance minister, should be consulted before the proposals for defence expenditure are settled and laid before the Legislature.[1]

In illustration of the principle of consultation by the Governor-General with the Federal ministry to the widest extent compatible with the preservation of his own responsibility, the J.C.R. in paragraph 178 gives two examples : (1) the question of sending Indian troops for service outside India; and (2) the question of India offering a contribution towards the cost of external operations. The Simon Commission in their Report, Vol. 2, paragraph 202, refer to the resolution of the Legislative Assembly of 28 March 1921, that the objects for which the Army in India exists are the defence of India against external aggression and the maintenance of internal order; and it is stated in the footnote to that paragraph that this definition by the Assembly of the objects for which the Army in India is maintained, was endorsed by the Cabinet. Usually, when Indian troops have been lent by the Government of India for imperial service outside India, the cost has been paid by the British taxpayer. But, as stated in the Sim.C.R., Vol. II, paragraph 203, a memorable exception occurred during the Great War when, with the approval of the Imperial Legislative Council, British India undertook in 1914 to defray the normal charges of troops withdrawn for the War, and in 1918, to provide a further contribution of £100 millions (subsequently increased by £13½ millions). In the J.C.R. 178, it is stated that, as regards the question of lending Indian troops for service outside India on occasions which in the Governor-General's decision do not involve the defence of India, he should not agree to the proposal without consultation with the Federal ministry, but the ultimate decision is to be taken by him. As regards the second question of India's contribution towards the cost of external operations (not falling under the reserved department of External Affairs), the J.P.C. are of opinion that the proposal should be ratified by the Federal Legislature.

Commander-in-Chief[2]

Previously, the Commander-in-Chief was ordinarily, though not necessarily, a member of the Council of the Governor-General. Though the superintendence and control of the military government of India is vested in the Governor-General as the King's representative, the command of His Majesty's Forces in India (the naval, military, and air forces) is exercised by a Commander-in-Chief appointed by His Majesty under s. 4 of this Act. The pay and allowances of the Commander-in-Chief and other conditions of service will be regulated by Order in Council.

[1] See pars. XVII–XIX of the Instrument of Instructions and J.C.R. 177.

[2] See old Act, ss. 19 and 37, and the Second Schedule; J.C.R. 164, 165 and 183; ss. 4 and 232.

Discipline and conditions of service[1]

The Federal Legislature can make laws for the regulation and discipline of all members of, and all persons attached to, or employed with, the Forces in India, who are not subject to the Army Act, the Air Force Act, or the Naval Discipline Act (unless in the last case, an Act of the Federal Legislature makes the Naval Discipline Act applicable to the Indian naval forces).[2] The rights of the members of the Forces in India, including the civil officials whose work lies within the sphere of defence and who are paid from the defence estimates, though they may not be affected by the constitutional changes to the same extent as the civil services, are safeguarded under the new Act. By s. 235, the Secretary of State has control over rules, regulations and orders affecting the conditions of service of the Forces in India, and s. 236 preserves the right of appeal of the members enjoyed by them previous to the passing of the new Act. Their pay, allowances and pensions are charged on the revenues of the Federation and are non-votable.[3] This safeguard is extended by s. 238 to the civil officials who are paid from the defence estimates.

Cadets

Sons of persons who have served in the military or the civil service of the Crown in India, or in Burma or Aden, before their separation from India, may be appointed officers in the army on the same or similar conditions prevailing before the new Act.[4]

232. The pay and allowances of the Commander-in-Chief of His Majesty's Forces in India and the other conditions of his service shall be such as His Majesty in Council may direct. *Pay, etc. of Commander-in-Chief*

For Commander-in-Chief, see s. 4 and Introduction to this Chapter.
Defence: See old Act ss. 19, 37 and 44; W.P. Intr. 14, 15 and 23; W.P. Prop. 11, 12 and 111; J.C.R. 34, 38, 165, 172–83, 178, 187, 188 and 295; Sim.C.R. 195, 215; new Act ss. 11, 33(3) (*e*), 99(2) (*e*), 105 and 232–39.

233.—(1) His Majesty in Council may require that appointments to such offices connected with defence as he may specify shall be made by him or in such manner as he may direct. *Control of His Majesty as to defence appointments*

(2) Nothing in this section derogates from any power vested in His Majesty by virtue of any Act or by virtue of his Royal Prerogative.

Royal Prerogative: See notes to s. 2 under PREROGATIVE POWERS.
The Government of India (Defence Appointments) Order, 1937, provides for appointments to certain offices being made by His Majesty.

1 See W.P. Prop. 111; J.C.R. 295; ss. 99(2) (*d*), 105, and 222–28, new Act.
2 See s. 105, new Act.
3 See ss. 33(3) (*e*) and 237 of the new Act.
4 See s. 239; and Sim.C.R., Vol. I, 122–24.

Eligibility for commissions in Indian Forces

234. The power of His Majesty, and of any person authorised in that behalf of His Majesty, to grant commissions in any naval, military or air force raised in India extends to the granting of a commission in any such force to any person who might be, or has been, lawfully enlisted or enrolled in that force.

Control of Secretary of State with respect to conditions of service

235. Without prejudice to the generality of the powers conferred on him by this Act, the Secretary of State may, acting with the concurrence of his advisers, from time to time specify what rules, regulations and orders affecting the conditions of service of all or any of His Majesty's Forces in India shall be made only with his previous approval.

Saving of rights of appeal

236. Nothing in this Act affects any right of appeal which members of His Majesty's Forces in India enjoyed immediately before the passing of this Act, and the Secretary of State may entertain any such memorial from a member of those Forces as the Secretary of State, or the Secretary of State in Council, might previously have entertained.

Pay, etc. of members of forces to be charged on Federal revenues

237. Any sums payable out of the revenues of the Federation in respect of pay, allowances, pensions or other sums payable to, or in respect of, persons who are serving, or have served, in His Majesty's forces shall be charged on those revenues, but nothing herein contained shall be construed as limiting the interpretation of the general provisions of this Act charging on the said revenues expenditure with respect to defence.

Charged on the revenues of the Federation : See s. 33(3). Such expenditure is not to be submitted to the vote of the Legislature. See s. 34(1).

Provisions as to certain civilian personnel

238. The provisions of the three last preceding sections shall apply in relation to persons who, not being members of His Majesty's forces, hold, or have held, posts in India connected with the equipment or administration of those forces or otherwise connected with defence, as they apply in relation to persons who are, or have been members of those forces.

King's India cadetships

239. In the appointment of officers to His Majesty's army the same provision as heretofore, or equal provision, shall be made for the appointment of sons of persons who

have served in India in the military or civil service of the Crown.

In this section the reference to persons who have served in India in the military or civil service of the Crown includes persons who have so served in Burma or in Aden before their respective separations from India.

See Introduction to this Chapter under CADETS.

CHAPTER II

CIVIL SERVICES

General Provisions

Tenure of office of persons employed in civil capacities in India

240.—(1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him :

Provided that this subsection shall not apply—

(*a*) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge ; or

(*b*) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

Every person who is in the civil employment of the Federation or of a Governor's Province, except a High Court or a Federal Judge, holds office during His Majesty's pleasure. A civil servant has, therefore, no right of action against the Crown for wrongful dismissal. In *Gould* v.

Stuart,[1] it was decided that the Crown has by law powers to dismiss at pleasure officers, both civil and military—a condition, unless it is otherwise provided by law to that effect, being implied by every contract of service. Even a contract cannot override this rule.[2] In *Hales* v. *the Crown*,[3] it was held that a public servant holds office during the Royal pleasure and that even if a special contract could be proved, the Crown will not be bound by the same. The case of *Macbeth* v. *Haldimond*[4] illustrates the immunity of colonial governors in respect of contracts made on behalf of the Crown. No official of the executive can make a contract of service binding on the Crown.[5] But a public servant professing to contract for the Crown cannot be sued for breach of warranty.[6] Notwithstanding the existence of this general rule, it is provided in subsection (4) that when a person is appointed to hold a service post (not being in the civil service of the Crown in India), under a contract, the contract may contain provisions for payment of compensation in the event of the service being abolished or prematurely terminated before the agreed period, for reasons not connected with any misconduct on his part. In the case of persons, serving in the military forces, however, the Crown has a general power of dismissing a military officer at its will and pleasure, and no contract can be made in derogation of such powers.[7]

Wrongful dismissal

The dismissal of a civil servant by an authority subordinate to that by which he was appointed is contrary to the provisions of s. 96B (1) of the old Act and is bad and inoperative.[8] This provision under the old Act is preserved in Cl. (2) of this section. The effect of rules and regulations framed by the Government regarding the conditions of public service, which are of statutory force, has given rise to difference of judicial opinion. Under s. 96B (1) of the old Act, subject to the provisions of that Act and of rules made thereunder, every civil servant holds office during His Majesty's pleasure. Does this mean that a civil servant has a right enforceable by action to hold office in accordance with these rules and in accordance with the procedure prescribed thereby ? In other words do the prescribed rules and regulations become part of the contract of service, though he holds office during His Majesty's pleasure ? Or are these rules and regulations merely directions given by the Crown to Government officials for general guidance and do not constitute a contract between the Crown and the civil servant ?

The former view finds support from the decisions in *Satish Chandra Das* v. *Secretary of State*[9] and *Baroni (J. R.)* v. *Secretary of State*.[10] In *Shenton* v. *Smith*,[11] Lord Hobhouse held that—

[1] [1896] A.C. 575.

[2] *Denming* v. *Secretary of State* (1920) 37 T.L.R. 138.

[3] (1918) 34 T.L.R. 589.

[4] (1786) 1 T.R. 172.

[5] *Graham* v. *Public Works Commissioners* [1901] 2 K.B. 781.

[6] *Dunn* v. *Macdonald* [1897] 1. Q.B. 401, 555; *Dunn* v. *The Queen* [1896] 1 Q.B. 116.

[7] *Grant* v. *Secretary of State* (1877) 44 L.J.C.P. 681 ; 2 C.P.D. 445.

[8] See *Rangachari* v. *Secretary of State for India* (1937) 64 I.A. 40.

[9] (1926) 54 Cal. 44.

[10] (1929) 8 Ran. 215. See also *Bimala Charan Batabyal* v. *Trustees for the Indian Museum* (1929) 57 Cal. 231 at p. 238.

[11] [1895] A.C. 229.

> unless in special cases where it is otherwise provided, servants of the Crown hold their office during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of the engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly his remedy is not by a law-suit, but by an appeal of an official or political kind . . . As for the regulations, their Lordships again agree with Stone J. that they are merely directions given by the Crown to the Government of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants.

In *Gould* v. *Stuart*,[1] on the other hand, it was held that the official held office under certain conditions expressly enacted and these express provisions of the statute were inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure.

But a contrary view has been taken by the Privy Council in two recent cases: *Rangachari* v. *Secretary of State*,[2] and *Venkata Rao* v. *Secretary of State*.[3] In the last case, the procedure of an enquiry prescribed in the Civil Service Classification Rules 1920–24 made under s. 96B of the old Act, was not observed and a most definite salutary rule was disregarded in most essential respects, as their Lordships held, and it was urged that the statute gave the appellant (the civil servant) a right to hold his office in accordance with the rules and that he would only be dismissed as prescribed by the rules and in accordance with the procedure prescribed thereby. But it was held that—

> S. 96B in express terms states that the office is held during pleasure. There is therefore no need for implication of this term, and no room for its exclusion. The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance.[4]

The terms of s. 96B assure that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action but will be regulated by rules which are manifold and minute but capable of change; and the appellant could be dismissed in spite of the failure to observe the procedure prescribed by them.

It will be observed (1) that the important words of s. 96B, subject to the provisions of this Act *and of rules made thereunder*, have been in Cl. (1) of this section replaced by the words: 'except as expressly provided by this Act', and (2) the Public Service Commission under s. 266(3) (*c*) have to be consulted by Government on all disciplinary matters affecting a civil servant, including memorials or petitions relating to such matter. This will ensure that complaints of any wrong done to him will be investigated by an impartial body independent of the Government department concerned.

For other rules safeguarding the rights of officials, see ss. 241(3) and (5), 247 and 258–60.

1 [1896] A.C. 575.
2 (1937) 64 I.A. 40.
3 (1937) 64 I.A. 55.
4 See the observations of Roche J. at p. 63.

241.—(1) Except as expressly provided by this Act, appointments to the civil services of, and civil posts under, the Crown in India, shall, after the commencement of Part III of this Act, be made— Recruitment and conditions of service

(*a*) in the case of services of the Federation, and posts in connection with the affairs of the Federation, by the Governor-General or such person as he may direct;

(*b*) in the case of services of a Province, and posts in connection with the affairs of a Province, by the Governor or such person as he may direct.

(2) Except as expressly provided by this Act, the conditions of service of persons serving His Majesty in a civil capacity in India shall, subject to the provisions of this section, be such as may be prescribed—

(*a*) in the case of persons serving in connection with the affairs of the Federation, by rules made by the Governor-General or by some person or persons authorised by the Governor-General to make rules for the purpose;

(*b*) in the case of persons serving in connection with the affairs of a Province, by rules made by the Governor of the Province or by some person or persons authorised by the Governor to make rules for the purpose:

Provided that it shall not be necessary to make rules regulating the conditions of service of persons employed temporarily on the terms that their employment may be terminated on one month's notice or less, and nothing in this subsection shall be construed as requiring the rules regulating the conditions of service of any class of persons to extend to any matter which appears to the rule-making authority to be a matter not suitable for regulation by rule in the case of that class.

(3) The said rules shall be so framed as to secure—

(*a*) that, in the case of a person who before the commencement of Part III of this Act was serving His Majesty in a civil capacity in India, no order which alters or interprets to his disadvantage any rule by which his conditions of service are regulated shall be made except by an authority which would have been competent to make such an order on the eighth day of March, nineteen hundred and twenty-

six, or by some person empowered by the Secretary of State to give directions in that respect;

(*b*) that every such person as aforesaid shall have the same rights of appeal to the same authorities from any order which—

(i) punishes or formally censures him; or

(ii) alters or interprets to his disadvantage any rule by which his conditions of service are regulated; or

(iii) terminates his appointment otherwise than upon his reaching the age fixed for superannuation,

as he would have had immediately before the commencement of Part III of this Act, or such similar rights of appeal to such corresponding authorities as may be directed by the Secretary of State or by some person empowered by the Secretary of State to give directions in that respect;

(*c*) that every other person serving His Majesty in a civil capacity in India shall have at least one appeal against any such order as aforesaid, not being an order of the Governor-General or a Governor.

(4) Notwithstanding anything in this section, but subject to any other provision of this Act, Acts of the appropriate Legislature in India may regulate the conditions of service of persons serving His Majesty in a civil capacity in India, and any rules made under this section shall have effect subject to the provisions of any such Act:

Provided that nothing in any such Act shall have effect so as to deprive any person of any rights required to be given to him by the provisions of the last preceding subsection.

(5) No rules made under this section and no Act of any Legislature in India shall be construed to limit or abridge the power of the Governor-General or a Governor to deal with the case of any person serving His Majesty in a civil capacity in India in such manner as may appear to him to be just and equitable:

Provided that, where any such rule or Act is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by that rule or Act.

Subject to the provisions of the Act, the Governor-General will make appointments to the civil services and civil posts of the Federation. Similar appointments will be made by the Governor in a Province. The Governor-General or some other person authorized by him will make rules regulating the conditions of service of persons employed in connexion with the affairs of the Federation. The Governor of a Province is charged with a similar duty in respect of the Provincial civil services. It is provided, however, in subsection (3) that the rules so prescribed cannot adversely affect the conditions of service of those who are already in the civil employment of the Crown. Their existing rights are fully secured, including the right to appeal from any order which punished or formally censures them or which alters or interprets any rule regulating the condition of service to their disadvantage or terminates their appointments prematurely.[1] As to the rights of present members of the Public Services, see J.C.R. 280–95.

Cl. (5): This subsection provides for an additional protection of the interests of the services. The provisions of s. 12(*d*) and s. 52(*c*) impose on the Governor-General and on each of the Provincial Governors a special responsibility for the securing to members of the public services of any rights provided or preserved for them by the Act and the safeguarding of their legitimate interests. The special responsibility which is expressed in wide terms extends to the rights conferred on public servants by the Act and also secures to them equitable and reasonable treatment in essential matters not covered specifically by statute. This subsection assures them of fair and equitable treatment for so long as they continue in service. This right to fair and just treatment is not, however, legally enforceable at the instance of the public servants.[2]

By paragraph 15 (2) of the Government of India (Commencement and Transitory Provisions) Order, 1936, it has been provided that, until other provisions are made under the new Act, the conditions of service for officials existing immediately before the commencement of Part III, shall continue to apply.

Application of preceding section to railway, customs, postal and telegraph services, and officials of courts

242.—(1) In its application to appointments to, and to persons serving in, the railway services of the Federation, the last preceding section shall have effect as if for any reference to the Governor-General in paragraph (*a*) of subsection (1), in paragraph (*a*) of subsection (2) and in subsection (5) there were substituted a reference to the Federal Railway Authority.

(2) In framing rules for the regulation of recruitment to superior railway posts, the Federal Railway Authority shall consult the Federal Public Service Commission, and in recruitment to such posts and in recruitment generally for railway purposes shall have due regard to the past association of the Anglo-Indian community with Railway Services in India, and particularly to the specific class, character, and numerical percentages of the posts hitherto held by members of that community and the remuneration

[1] See s. 248.

[2] See notes to s. 12 (*d*).

attaching to such posts, and shall give effect to any instructions which may be issued by the Governor-General for the purpose of securing, so far as practicable to each community in India a fair representation in the railway services of the Federation, but, save as aforesaid, it shall not be obligatory on the Authority to consult with, or otherwise avail themselves of the services of, the Federal Public Service Commission.

(3) In framing the rules for the regulation of recruitment to posts in the Customs, Postal and Telegraph services, the Governor-General or person authorised by him in that behalf shall have due regard to the past association of the Anglo-Indian community with the said services, and particularly to the specific class, character and numerical percentages of the posts previously held in the said services by members of the said community and to the remuneration attaching to such posts.

(4) In its application to appointments to, and to persons serving on, the staff attached to the Federal Court or the staff attached to a High Court, the said section shall have effect as if, in the case of the Federal Court, for any reference to the Governor-General in paragraph (*a*) of subsection (1), in paragraph (*a*) of subsection (2) and in subsection (5) there were substituted a reference to the Chief Justice of India and as if, in the case of a High Court, for any reference to the Governor in paragraph (*b*) of subsection (1), in paragraph (*b*) of subsection (2) and in subsection (5) there were substituted a reference to the chief justice of the court:

Provided that—

(*a*) in the case of the Federal Court, the Governor-General and, in the case of a High Court, the Governor may in his discretion require that in such cases as he may in his discretion direct no person not already attached to the court shall be appointed to any office connected with the court save after consultation with the Federal Public Service Commission, or the Provincial Public Service Commission, as the case may be;

(*b*) rules made under the said subsection (2) by a chief justice shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor-General or, as the case may be, the Governor.

This section confers powers on the Statutory Railway Authority to make appointments in the railway services of the Federation and to regulate the conditions of such service. See s. 181.

Cl. (2): This subsection requires the statutory authority to consult the Public Services Commission [1] in framing rules for the regulation of recruitment to superior railway posts and in recruitment to such and other posts for railway purposes.

This and the following subsection secure to the Anglo-Indian community special protection in the matter of recruitment to posts in the railway, customs, postal and telegraph services. See J.C.R. 321. Special consideration is to be given to the claims of this community for employment in these services.

As regards the percentage referred to in this subsection, see the Resolution of the Home Department of the Government of India, dated 4 July 1934, which contains rules for the determination and improvement of the representation of minorities in the public services. In accordance with this Resolution, the claims of the Anglo-Indians who, at present obtain 9 per cent of the Indian vacancies in the gazetted railway posts for which recruitment is made on an All-India basis, will be considered when and if their share falls below 9 per cent, while 8 per cent of the railway subordinate posts filled by direct recruitment is to be reserved for Anglo-Indians. This subsection further requires that their claims shall receive due consideration in matters of remuneration also.

A reference has been included in the Instrument of Instructions of the Governor-General and Governors to the fact that the legitimate interests of the minorities include their due representation in the Public Services. It would, of course, be incumbent on the Governor-General and Governors, in the discharge of their special responsibility for the legitimate interests of the minorities, to see that no change is made in the percentages prescribed without their approval.[2]

Cl. (4): Appointments to the staff attached to the Federal Court are made by the Chief Justice of India and those to the staff attached to a High Court are to be made by the Chief Justice of that court. The Governor-General may, however, require the Chief Justice of India to make appointment to the Federal Court after consultation with the Federal Public Services Commission. Likewise, the Governor of a Province may require the Chief Justice of a High Court to make appointments to that court after consultation with the Provincial Public Service Commission.

This subsection, however, does not apply to the appointments of judges of the Federal Court or of a High Court.

243. Notwithstanding anything in the foregoing provisions of this chapter, the conditions of service of the subordinate ranks of the various police forces in India shall be such as may be determined by or under the Acts relating to those forces respectively. *Special provisions as to police*

See notes to s. 56.

[1] See Chapter III.
[2] See ss. 12 (c) and 52 (b).

Recruitment by Secretary of State and provisions as to certain posts

Services recruited by Secretary of State

244.—(1) As from the commencement of Part III of this Act appointments to the civil services known as the Indian Civil Service, the Indian Medical Service (Civil), and the Indian Police Service (which last-mentioned service shall thereafter be known as 'the Indian Police') shall, until Parliament otherwise determines, be made by the Secretary of State.

(2) Until Parliament otherwise determines, the Secretary of State may also make appointments to any service or services which at any time after the said date he may deem it necessary to establish for the purpose of securing the recruitment of suitable persons to fill civil posts in connection with the discharge of any functions of the Governor-General which the Governor-General is by or under this Act required to exercise in his discretion.

(3) The respective strengths of the said services shall be such as the Secretary of State may from time to time prescribe, and the Secretary of State shall in each year cause to be laid before each House of Parliament a statement of the appointments made thereto and the vacancies therein.

(4) It shall be the duty of the Governor-General to keep the Secretary of State informed as to the operation of this section, and he may after the expiration of such period as he thinks fit make recommendations for the modification thereof.

In discharging his functions under this subsection, the Governor-General shall act in his discretion.

The Secretary of State is to continue to make appointments to the civil services known as the Indian Civil Service, the Indian Medical Service and the Indian Police upon an All-India basis. The proportions in which Indians and Europeans are to be recruited for them shall be as prescribed by the Lee Commission, the recommendations of which have been mainly accepted by the Secretary of State and have already been put into force. For the Indian Civil Service, it has been settled that 20 per cent of the superior posts shall be filled by the appointment of provincial civil service officers to 'listed posts' (i.e. posts reserved for members selected for the provincial service, such as the charge of a District or the post of a District and Sessions Judge) and that direct recruits in future should be Indian and European in equal numbers. On this basis, it was calculated that by 1939 half of the service would be Indian, half European, allowing for Indians in listed posts.

For the Indian Police Service, direct recruitment was to be in the proportion of five Europeans to three Indians; allowing for promotion from the provincial service to fill 20 per cent of all vacancies. This would

produce, it was estimated, a personnel, half Indian and half European by 1949.

Under existing arrangements there is no direct recruitment for the Indian Medical Service (Civil). Vacancies are filled from among officers appointed to the Indian Medical Service who have had a period of military duty. This section confers on the Secretary of State powers (which he possesses under the old Act) to require the Provinces to employ a specified number of Indian Medical Service officers.

Cl. (*2*) : The subsection mainly provides for appointments in the Ecclesiastical and Political departments. Recruitment to the Political department has hitherto been indirect, vacancies being filled by transfers from the Indian Army and the Civil Service (mainly the Indian Civil Service) and to a small extent, by the promotion of subordinate political officers.

Cl. (*3*) : The Secretary of State is required to prescribe the number and character of civil posts to be held by persons appointed by him and under s. 246, he can prohibit the filling of any posts declared to be a reserved post otherwise than by the appointment of one of these persons or the keeping vacant of any reserved post for a period longer than three months without the previous sanction of the Secretary of State or save under conditions prescribed by him.

Cl. (*4*) : The question of future recruitment for services mentioned in this section may be reviewed by the Secretary of State, who may make recommendations for the modifications of the methods of recruitment provided herein, for the appointment of a greater number of Indians, for the diminution of the number of reserved posts and so of the number of officers to be appointed by him. Further, under subsection (2), the Parliament may determine that the Governor-General or the Governor may make the appointments referred to, instead of the Secretary of State. All these may be done by Parliament under ss. 244 and 246 without altering the Act itself. The J.P.C. in paragraph 298 of their Report stated that their recommendation (embodied in the Act) about the control by the Secretary of State over the appointments and posting of the higher officers was not intended to be a permanent and final solution of the difficult question. They approved of the principle of the W.P. Prop. 189 that after an interval, an enquiry should be held into the future recruitment to the I.C.S. and the Indian Police, the decision on the results of the enquiry resting with His Majesty's Government, subject to the approval of the Parliament. The Joint Committee were of opinion that the constitution Act should make provision for enabling the arrangements for recruitment and control of these two services to be varied without an amending Act.

245. Until Parliament otherwise determines, the Secretary of State may for the purpose of securing efficiency in irrigation in any Province, appoint persons to any civil service of, or civil post under, the Crown in India concerned with irrigation. Special provision as to irrigation

Irrigation, under the Act, comes under the control of a responsible minister. The higher administrative posts in the irrigation service were under the old Act filled by members of the Indian Service of Engineers. Since 1924, on the recommendation of the Lee Commission, recruitment of irrigation engineers has been in the proportion of 40 Europeans

and 40 Indians for every 100 appointments, the remainder being filled by officers promoted from the provincial services. In all cases, appointments were made by the Secretary of State. This practice can no longer be continued under the Act, as the irrigation service becomes a provincial service. Under this section, power is, nevertheless, reserved to the Secretary of State, until otherwise determined by Parliament, to make recruitment to the irrigation service in any Province for the purpose of securing efficiency in irrigation. In the opinion of the Joint Select Committee,[1] this power is to be exercised by the Secretary of State if a Provincial Government proves unable to secure a sufficient number of satisfactory recruits and if the economic position of the Province and the welfare of its inhabitants are thereby prejudiced, it is for the Secretary of State to determine whether the recruitment in any Province shall be made by him under this section.

Reserved posts

246.—(1) The Secretary of State shall make rules specifying the number and character of the civil posts under the Crown (other than posts in connection with any functions of the Governor-General which the Governor-General is by or under this Act required to exercise in his discretion), which, subject to the provisions of this subsection, are to be filled by persons appointed by the Secretary of State to a civil service of, or a civil post under, the Crown in India, and except under such conditions as may be prescribed in the rules no such post shall, without the previous sanction of the Secretary of State—

(*a*) be kept vacant for more than three months; or
(*b*) be filled otherwise than by the appointment of such a person as aforesaid; or
(*c*) be held jointly with any other such post.

(2) Appointments and postings to the said posts (hereinafter in this Part of this Act referred to as 'reserved posts') shall—

(*a*) in the case of posts in connection with the affairs of the Federation, be made by the Governor-General, exercising his individual judgment;
(*b*) in the case of posts in connection with the affairs of a Province, be made by the Governor of the Province, exercising his individual judgment.

(3) All rules made under this section shall, so soon as may be after they are made, be laid before each House of Parliament and, if either House of Parliament within the next subsequent twenty-eight days on which that House has sat after any such rule has been laid before it

[1] J.C.R. 309.

resolves that the rule shall be annulled, the rule shall thenceforth be void but without prejudice to the validity of anything previously done thereunder or to the making of a new rule.

Cl. (2) : This subsection puts restrictions on the control by ministers over officers appointed by the Secretary of State in the matter of their appointments and postings, as their orders relating thereto may be overruled by the Governor-General in the Federation or the Governor in a Province, exercising his individual judgement.

See also s. 247(2) which provides that the matter of the promotion or suspension of such officers, and of leave for not less than three months are to be similarly regulated by the Governor-General or the Governor. See notes under s. 244(4) and J.C.R. 298.

Conditions of service, pensions, etc. of persons recruited by Secretary of State

247.—(1) The conditions of service of all persons appointed to a civil service or a civil post by the Secretary of State shall—

(*a*) as respects pay, leave and pensions, and general rights in regard to medical attendance, be such as may be prescribed by rules to be made by the Secretary of State;

(*b*) as respects other matters with respect to which express provision is not made by this chapter, be such as may be prescribed by rules to be made by the Secretary of State in so far as he thinks fit to make such rules, and, in so far and so long as provision is not made by such rules, by rules to be made, as respects persons serving in connection with the affairs of the Federation, by the Governor-General or some person or persons authorised by the Governor-General to make rules for the purpose and, as respects persons serving in connection with the affairs of a Province, by the Governor of the Province or some person or persons authorised by the Governor to make rules for the purpose :

Provided that no rule made under this subsection shall have effect so as to give to any person appointed to a civil service or civil post by the Secretary of State less favourable terms as respects remuneration or pension than were given to him by the rules in force on the date on which he was first appointed to his service or was appointed to his post.

(2) Any promotion of any person appointed to a civil service or a civil post by the Secretary of State or any

order relating to leave of not less than three months of any such person, or any order suspending any such person from office shall, if he is serving in connection with the affairs of the Federation, be made by the Governor-General exercising his individual judgment and, if he is serving in connection with the affairs of a Province, be made by the Governor exercising his individual judgment.

(3) If any such person as aforesaid is suspended from office, his remuneration shall not during the period of his suspension be reduced except to such extent, if any, as may be directed by the Governor-General exercising his individual judgment or, as the case may be, by the Governor exercising his individual judgment.

(4) The salary and allowances of any such person as aforesaid shall, if he is serving in connection with the affairs of the Federation, be charged on the revenues of the Federation and, if he is serving in connection with the affairs of a Province, be charged on the revenues of the Province:

Provided that, if any such person is serving in connection with the railways in India, so much only of his salary and allowances shall be charged on the revenues of the Federation as is not paid out of the Railway Fund.

(5) Pensions payable to or in respect of any such person as aforesaid, and government contributions in respect of any such person to any pension fund or provident fund, shall be charged on the revenues of the Federation.

(6) No award of a pension less than the maximum pension allowable under rules made under this section shall be made, except in each case with the consent of the Secretary of State.

(7) No rules made under this section shall be construed to limit or abridge the power of the Secretary of State to deal with the case of any person serving His Majesty in a civil capacity in India in such manner as may appear to him to be just and equitable, and no rules made under this section by any person other than the Secretary of State shall be construed to limit or abridge the power of the Governor-General or, as the case may be, the Governor of a Province to deal with the case of any such person in such manner as may appear to him to be just and equitable:

Provided that, where any rule made under this section is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by the rule.

The provisions of this and the next sections apply to persons appointed by the Secretary of State in Council before the commencement of this Act as also to persons to be appointed by the Secretary of State thereafter. The Secretary of State is to regulate the conditions of service of all persons appointed by him. Among the conditions of service which the Act secures to all such officers are the following:

(i) A right of complaint to the Governor-General or the Governor against any order from an official superior affecting his condition of service.

(ii) A right to the concurrence of the Governor-General or the Governor to any order of posting or to any order affecting emoluments or pensions and any order of formal censure.

(iii) A right of appeal to the Secretary of State against orders passed by an authority in India—

(*a*) of censure or punishment,
(*b*) affecting disadvantageously his conditions of service,
(*c*) terminating his employment before the age of superannuation.

For contingencies not susceptible of statutory definition, the special responsibility of the Governor-General and Governors, and the control which the Secretary of State and his advisers will exercise over the conditions of service of officers appointed by the Secretary of State, afford an additional protection to the officers.

Pensions are charged on federal revenues and the Governor-General has the power to secure payment, if necessary, by borrowing in the United Kingdom on the security of Indian revenues.

Claims for such pensions will lie against the Federal Government only, and it will be the duty of that Government to make any necessary adjustments with the Provinces. Thus, a claim to pension by an officer, appointed by the Secretary of State, who has served, from time to time in different Provinces will lie against the Federal Government, and the officer concerned will not be required to make his claim against a number of authorities in respect of the different portions of his pension. Those who serve in appointments made by the Crown or the Secretary of State or serve in reserved posts or in military posts are assured freedom from Indian taxation on pensions if permanently resident outside India. See s. 272.

Rights in respect of complaints, appeals, etc.

248.—(1) If any person appointed to a civil service or a civil post by the Secretary of State is aggrieved by an order affecting his conditions of service and on due application to the person by whom the order was made does not receive the redress to which he considers himself entitled, he may, without prejudice to any other mode of obtaining redress, complain, if he is serving in connection with the affairs of the Federation, to the Governor-General and, if he is serving in connection with the affairs of a Province, to the Governor of the Province, and the Governor-General or Governor, as the case may be, shall examine into the complaint and cause such action to be taken thereon as appears to him exercising his individual judgment to be just and equitable.

(2) No order which punishes or formally censures any such person as aforesaid, or affects adversely his emoluments or rights in respect of pension, or decides adversely to him the subject-matter of any memorial, shall be made except, if he is serving in connection with the affairs of the Federation, by the Governor-General, exercising his individual judgment, or, if he is serving in connection with the affairs of a Province, by the Governor of that Province, exercising his individual judgment.

(3) Any person appointed to a civil service or a civil post by the Secretary of State may appeal to the Secretary of State against any order made by any authority in India which punishes or formally censures him, or alters or interprets to his disadvantage any rule by which his conditions of service are regulated.

(4) Any sums ordered to be paid out of the revenues of the Federation or a Province to or in respect of any such person as aforesaid on an appeal made under this section shall be charged on those revenues.

See s. 241(3) (*b*) for right of appeal by officers serving before 1 April 1937. This section provides for a right of complaint or of appeal by an officer appointed after that date to the Governor-General, if he is serving the Federation, or to the Governor, if he is serving a Province.

Compensation

249.—(1) If by reason of anything done under this Act the conditions of service of any person appointed to a civil service or a civil post by the Secretary of State have been adversely affected, or if for any other reason it appears to the Secretary of State that compensation ought to be granted to, or in respect of, any such person, he or his representatives shall be entitled to receive from the revenues of the Federation, or if the Secretary of State so directs, from the revenues of a Province, such compensation as the Secretary of State may consider just and equitable.

(2) Any sum payable under this section from the revenues of the Federation or the revenues of a Province shall be charged on the revenues of the Federation, or, as the case may be, that Province.

(3) For the avoidance of doubt it is hereby declared that the foregoing provisions of this section in no way prohibit expenditure by the Governor-General, or, as the case may be, the Governor, from the revenues of the Federation or a Province by way of compensation to persons who are serving or have served His Majesty in India in cases to which those provisions do not apply.

In addition to the rights and safeguards provided in this Act, officers appointed by the Secretary of State in Council before the Act comes into force, will have a right to such compensation for the loss of any existing right, as the Secretary of State may consider just and equitable. A summary of the principal service rights, under the old law, of persons appointed either by the Secretary of State in Council or by any other authority is given in Appendix VII of the White Paper.[1] Some of the existing service rights have been conferred by the old Act; others are embodied in statutory rules made by the Secretary of State in Council. But if these rights are varied under the provisions of the new Act, to the disadvantage of persons who have a valid claim to these rights, the Secretary of State may pay compensation.

In addition to the provision for compensation for the loss of service rights, the Secretary of State has further been empowered to award compensation to any officer appointed by him in any other case in which he considers it just and equitable that compensation should be awarded.

Provisions as to persons appointed by Secretary of State in Council, persons holding reserved posts and commissioned officers in civil employment

Application of four last preceding sections to persons appointed by Secretary of State in Council, and certain other persons

250.—(1) Subject to the provisions of this section, the provisions of the four last preceding sections and any rules made thereunder shall apply in relation to any person who was appointed before the commencement of Part III of this Act by the Secretary of State in Council to a civil service of, or a civil post under, the Crown in India as they apply in relation to persons appointed to a civil service or civil post by the Secretary of State.

(2) Subject to the provisions of this section, the said sections and rules shall, in such cases and with such exceptions and modifications as the Secretary of State may decide, also apply in relation to any person who—

(*a*) not being a person appointed as aforesaid by the Secretary of State or the Secretary of State in Council, holds or has held a reserved post; or

(*b*) holds or has held any civil post under the Crown in India and is, or was when he was first appointed to such a post, an officer in His Majesty's forces.

(3) In relation to any person who was appointed before the commencement of Part III of this Act to a civil service of, or to a civil post under, the Crown in India, the provision contained in the sections aforesaid that no rule as to conditions of service shall have effect so as to give to any person less favourable terms as regards remuneration or pension than were given to him by the rules in force

[1] At pp. 373–75 of the J.C.R.

on the date on which he was first appointed to his service or was appointed to his post, shall be construed as a provision that no such rule shall have effect so as to give to any person less favourable terms as respects the said matters than were given to him by the rules in force immediately before the coming into operation of the rule.

(4) In its application, by virtue of this section, to persons serving in the railway services of the Federation, the second of the four last preceding sections (which relates to the conditions of service, pensions, etc. of persons recruited by the Secretary of State) shall have effect as if for any reference to the Governor-General in paragraph (*b*) of subsection (1) thereof and in subsections (2), (3) and (7) thereof there were substituted a reference to the Federal Railway Authority.

(5) Any liability of the Federation or of any Province to or in respect of any person appointed before the commencement of Part III of this Act by the Secretary of State in Council to a civil service of, or a civil post under, the Crown in India, being a liability to pay a pension granted to or in respect of any such person or any other liability of such a nature as to have been enforceable in legal proceedings against the Secretary of State in Council if this Act had not been passed, shall, notwithstanding anything in this Act, be deemed, for the purposes of the provisions of Part VII of this Act relating to legal proceedings, to be a liability arising under a statute passed before the commencement of Part III of this Act.

For the definition of *reserved posts*, see s. 246.
Cl. (*4*) *:* For Federal Railway Authority, see s. 181.
Cl. (*5*) *:* See s. 178 of the Act.

Special provisions as to staffs of the High Commissioner for India and the Auditor of Indian Home Accounts

Staff of High Commissioner and Auditor of Indian Home Accounts

251. The provisions of this Part of this Act shall apply in relation to appointments to, and to persons serving on, the staffs of the High Commissioner for India and the Auditor of Indian Home Accounts as if the service of members of those staffs were service rendered in India :

Provided that—

(*a*) appointments to the staff of the Auditor of Indian Home Accounts shall be made by him subject, as respects numbers, salaries and qualifications, to the approval of the Governor-General in his discretion ; and

(*b*) in relation to that staff the functions of the Governor-General under this Part of this Act shall be exercised by him in his discretion.

For *High Commissioner*, see s. 302; for *Auditor of Indian Home Accounts*, see s. 170.

252.—(1) All persons who immediately before the commencement of Part III of this Act were members of the staff of the High Commissioner for India, or members of the staff of the Auditor of the accounts of the Secretary of State in Council, shall continue to be, or shall become, members of the staff of the High Commissioner for India or, as the case may be, of the Auditor of Indian Home Accounts.

Conditions of service of existing staff of High Commissioner and Auditor of Indian Home Accounts

(2) All such persons as aforesaid shall hold their offices or posts subject to like conditions of service as to remuneration, pensions or otherwise, as theretofore, or not less favourable conditions, and shall be entitled to reckon for purposes of pension any service which they would have been entitled to reckon if this Act had not been passed.

(3) The salaries, allowances and pensions payable to, or in respect of, such of the persons aforesaid as were members of the staff of the Auditor of the accounts of the Secretary of State in Council shall be charged on the revenues of the Federation, and the salaries, allowances and pensions payable to, or in respect of, other such persons as aforesaid shall be so charged in so far as those salaries, allowances and pensions would, but for the passing of this Act, have been payable without being submitted to the vote of the Legislative Assembly of the Indian Legislature.

Persons serving in the office of the High Commissioner for India or of the Auditor of Indian Home Accounts are to continue service on the same conditions as before. Their salaries, allowances and pensions are charged on the revenues of the Federation. Under s. 157(2), the Federation, or a Province utilizing the services of the High Commissioner, shall keep him in funds for the payment of pensions so charged on the revenues.

Special Provisions as to Judicial Officers

253.—(1) The provisions of this chapter shall not apply to the judges of the Federal Court or of any High Court:

Judges of the Federal Court and High Courts

Provided that—

(*a*) for the purposes of this section a member of any of the civil services of the Crown in India who

is acting temporarily as a judge of a High Court shall not be deemed to be a judge of that Court :

(*b*) nothing in this section shall be construed as preventing the Orders in Council relating to the salaries, leave and pensions of judges of the Federal Court, or of any High Court, from applying to such of those judges as were, before they were appointed judges, members of a civil service of the Crown in India, such of the rules relating to that service as may appear to His Majesty to be properly applicable in relation to them :

(*c*) nothing in this section shall be construed as excluding the office of judge of the Federal Court or of a High Court from the operation of the provisions of this chapter with respect to the eligibility for civil office of persons who are not British subjects.

(2) Any pension which under the rules in force immediately before the commencement of Part III of this Act was payable to or in respect of any person who, having been a judge of a High Court within the meaning of this Act or of the High Court at Rangoon, retired before the commencement of the said Part III shall, notwithstanding anything in this Act or the Government of Burma Act, 1935, continue to be payable in accordance with those rules and shall be charged on the revenues of the Federation.

(3) Any liability of the Federation or of any Province to or in respect of any person who is, at the commencement of Part III of this Act, a judge of a High Court within the meaning of this Act, or to or in respect of any such person as is mentioned in subsection (2) of this section, being a liability to pay a pension granted to or in respect of any such person or any other liability of such a nature as to have been enforceable in legal proceedings against the Secretary of State in Council if this Act had not been passed, shall, notwithstanding anything in this Act or the Government of Burma Act, 1935, be deemed, for the purposes of the provisions of Part VII of this Act relating to legal proceedings, to be a liability arising under a statute passed before the commencement of Part III of this Act.

Cl. (3) *:* See s. 178 of the Act.

254.—(1) Appointments of persons to be, and the posting and promotion of, district judges in any Province shall be made by the Governor of the Province, exercising his individual judgment, and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor.

District judges, etc.

(2) A person not already in the service of His Majesty shall only be eligible to be appointed a district judge if he has been for not less than five years a barrister, a member of the Faculty of Advocates in Scotland, or a pleader and is recommended by the High Court for appointment.

(3) In this and the next succeeding section the expression 'district judge' includes additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, sessions judge, additional sessions judge, and assistant sessions judge.

The appointment, posting and promotion of district judges will be made by the Governor in the exercise of his individual judgement, on the recommendation of the minister made after consulting the High Court. The term district judge is defined in Cl. (3). A recommendation to the Governor by the minister for the appointment of a member of the subordinate civil service as district judge is to be made after the approval of the Public Service Commission and of the High Court. A recommendation as to direct appointments from the Bar is to be made from among the persons nominated by the High Court subject to general regulations in force regarding communal proportions. Promotions of district judges (except automatic time scale promotions) are to be made by the Governor in his individual judgement on the recommendation of the minister after consultation with the High Court. See J.C.R. 340.

255.—(1) The Governor of each Province shall, after consultation with the Provincial Public Service Commission and with the High Court, make rules defining the standard of qualifications to be attained by persons desirous of entering the subordinate civil judicial service of a Province.

Subordinate civil judicial service

In this section, the expression 'subordinate civil judicial service' means a service consisting exclusively of persons intended to fill civil judicial posts inferior to the post of district judge.

(2) The Provincial Public Service Commission for each Province, after holding such examinations, if any, as the Governor may think necessary, shall from time to time out of the candidates for appointment to the subordinate civil judicial service of the Province make a list or lists of the persons whom they consider fit for appointment to that service, and appointments to that service

shall be made by the Governor from the persons included in the list or lists in accordance with such regulations as may from time to time be made by him as to the number of persons in the said service who are to belong to the different communities in the Province.

(3) The posting and promotion of, and the grant of leave to, persons belonging to the subordinate civil judicial service of a Province and holding any post inferior to the post of district judge, shall be in the hands of the High Court, but nothing in this section shall be construed as taking away from any such person the right of appeal required to be given to him by the foregoing provisions of this chapter, or as authorising the High Court to deal with any such person otherwise than in accordance with the conditions of his service prescribed thereunder.

The Joint Committee were of opinion that the appointments to the subordinate judiciary must be made by the authorities in India who will exercise a certain measure of control over the judges after their appointment, specially in regard to promotion and posting. Reference was made to the mischiefs which may result from a system under which promotion depended upon a minister exposed to pressure from the members of the Legislatures. Nothing is more likely to sap the independence of a magistrate than the knowledge that his career depends upon the favour of a minister who may be influenced by others. The Joint Committee in paragraph 337 of their Report lay stress on the desirability of the independence of the subordinate judiciary being placed beyond question; (which is even more important that the independence of the superior judges). The Joint Committee recommend that a strict rule should be enforced that recommendation or canvassing by any member of the Legislature on behalf of a member of the subordinate judiciary should be sufficient to disqualify that candidate, whatever may be his merits. See par. 338.

They add:

> We would admit no exception to this rule, which has for many years been accepted without question in the Civil Service of the United Kingdom. We do not for a moment suggest that Indian Ministers will be willing to adopt any lower standards; but this is a matter in which the right principle ought to be laid down at the very outset of the new constitutional order; and the observations which we have thought it our duty to make may perhaps serve in future to strengthen the hands of Ministers who find themselves exposed to improper pressure from those whose standards may not be as high as their own.

As regards the subordinate civil judicial service, the Joint Committee recommend that the Governor on the advice of his minister, after consultation with the Provincial Public Service Commission and with the High Court, should make rules for the qualification of candidates. Then the candidates are to be selected for appointment by the Public Service Commission in consultation with the High Court, subject to general

regulations made by the Provincial Government as to the observance of communal proportions. The introduction of communal considerations in the matter of appointments to the judiciary is against precedent and principle, which hitherto has been the appointment of the most suitable person, irrespective of his religion, race or caste. The Public Service Commission will forward the names of the selected candidates to the minister and appointments will be made by the Governor. Promotion, postings and leave are to be in the hands of the High Court subject to the usual right of appeal open to all civil servants under Part X, Chapter II. At present in Bengal, appointments to the subordinate civil judicial service are made by the Governor on the recommendation of the High Court.

256. No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to, or the withdrawal of any magisterial powers from, any person save after consultation with the district magistrate of the district in which he is working, or with the Chief Presidency magistrate, as the case may be. Subordinate criminal magistracy

In the case of the subordinate criminal magistracy, the Joint Committee in paragraph 341 of their Report recommended that appointments to this service should be made from candidates selected by the Public Service Commission, by the Governor acting on the advice of his ministers. Under s. 266 of this Act, it is the duty of the Commission to conduct examinations for appointments to the services of the Province. Under s. 267, an Act of the Provincial Legislature may provide for the exercise of additional functions by the Provincial Public Service Commission.

In the case of subsequent promotions or postings, the Joint Committee remark, the minister should ask for recommendations of the district magistrate, in consultation, where necessary, with the Sessions Judge; and if these recommendations are disregarded, some machinery should be devised for bringing the matter to the notice of the Governor.

Special Provisions as to Political Department

257.—(1) Subject to the provisions of this section, the provisions of this Part of this Act shall not apply in relation to persons wholly or mainly employed in connection with the exercise of the functions of the Crown in its relations with Indian States. Officers of political department

(2) Notwithstanding anything in the preceding subsection, all persons so employed immediately before the commencement of Part III of this Act shall hold their offices or posts subject to the like conditions or service as to remuneration, pensions or otherwise as theretofore or not less favourable conditions, and in relation to those persons anything which might, but for the passing of this Act, have been done by or in relation to the Secretary

of State in Council shall be done by or in relation to the Secretary of State, acting with the concurrence of his advisers.

(3) Nothing in this section shall be construed as affecting the application to such persons of the rule of law that, except as otherwise provided by statute, every person employed under the Crown holds office during His Majesty's pleasure.

The total strength of the Political department, of which the Governor-General himself held the portfolio, on 1 October 1933, was 108. They included, on the External side, the Secretariat, district and judicial appointments in Baluchistan and North-West Frontier Province and in the political agencies in tribal territory, political agencies in the Persian Gulf and a proportion of consular appointments in Persia; such appointments as those at the legations in Afganistan and Nepal and the Consulate-General at Kashgar. On the Internal side they included the appointments to political agencies and residencies through which the relations of the Crown with the Indian States are concluded; and the civil administration of the Cantonment areas in the Indian States.[1]

The Secretary of State will recruit officers to the reserved departments of External affairs and the department which will be responsible for conducting relations with non-federated States in all matters and with the Federated States in matters not accepted as federal by their Rulers in their Instruments of Accession. Officers of the Indian Army and members of the Indian Civil Service appointed to the department by the Governor-General and His Majesty's representative will enjoy the same measure of protection as has been accorded to officers appointed to the Services by the Secretary of State.

Under Cl. (2) of this section, declaration has been made by His Majesty's representative for the exercise of the functions of the Crown in its relation with the Indian States.[2]

During His Majesty's pleasure: See notes to s. 240(1).

Provisions for the protection of certain existing officers

Provision for protection of existing officers of certain Services

258.—(1) No civil post which, immediately before the commencement of Part III of this Act, was a post in, or a post required to be held by some member of, a Central Service Class I, a Central Service Class II, a Railway Service Class I, a Railway Service Class II, or a Provincial Service, shall, if the abolition thereof would adversely affect any person who immediately before the said date was a member of any such service, be abolished, except—

(*a*) in the case of a post in connection with the affairs of the Federation, by the Governor-General exercising his individual judgment;

[1] See par. 303 of the Joint Select Committee Report.

[2] See the Gazette of India Extraordinary, April 1, 1937, p. 381—Notif. 1—Fed. I.

(b) in the case of a post in connection with the affairs of a Province, by the Governor of the Province exercising his individual judgment.

(2) No rule or order affecting adversely the pay, allowances or pensions payable to, or in respect of, a person appointed before the coming into operation of this Part of this Act to a Central Service Class I, to a Railway Service Class I, or to a Provincial service, and no order upon a memorial submitted by any such person, shall be made except—

(a) in the case of a person who is serving or has served in connection with the affairs of the Federation, by the Governor-General exercising his individual judgment;

(b) in the case of a person who is serving or has served in connection with the affairs of a Province, by the Governor of the Province exercising his individual judgment.

(3) In relation to any person mentioned in this section who was appointed to a civil service of, or civil post under, the Crown in India by the Secretary of State or the Secretary of State in Council, or is an officer in His Majesty's forces, the foregoing provisions of this section shall have effect as if for the reference to the Governor-General or the Governor, as the case may be, there was substituted a reference to the Secretary of State.

Central Service, Railway Service, and Provincial Service are defined in s. 277(1).

Ss. 258–60 deal with the protection of the rights of officers in employment before Part III of the Act came into force or those who have retired before that date. The rights of the former class of officers are not to be prejudicially affected by subsequent changes, unless so made by the Governor-General or the Governor in the exercise of his individual judgement regarding central posts or provincial posts respectively. The right of appeal to these officers is given to the Governor-General or the Governor, as the case may be, exercising his individual judgement. A special provision is made regarding certain officials serving on or before 1 April 1924, prior the Lee Commission recommendations. The salaries and allowances of such officials are to be charged on the revenues of the Federation or of the Province, as the case may be. Pensions and Government contributions to Provident or Pension Fund are to be charged on the federal revenues. Generally, as regards pensions to officials who have retired before Part III of this Act came into force, they are, if payable by a local Government under the old Act, to be paid out of provincial revenues, and in other cases, out of federal revenues. See J.C.R. 280–94.

For rules safeguarding the rights of officials, see ss. 240, 241 and 247.

Prov sions as to certain persons serving in or before 1924

259.—(1) The salary and allowances of any person who was appointed before the first day of April, nineteen hundred and twenty-four, otherwise than by the Secretary of State in Council, to a service or a post which at any time between that date and the coming into operation of this Part of this Act was classified as a superior service or post shall be charged, if he is serving in connection with the affairs of the Federation, on the revenues of the Federation and, if he is serving in connection with the affairs of a Province, on the revenues of that Province :

Provided that, if any such person as aforesaid is serving in connection with the railways in India, so much only of his salary and allowances shall be charged on the revenues of the Federation as is not paid out of the railway fund.

(2) Any pension payable to or in respect of a person appointed as aforesaid, and any government contributions to any provident fund or pensions fund in respect of any such person, shall be charged on the revenues of the Federation.

(3) The provisions of the last preceding subsection shall also apply in relation to persons who retired before the first day of April, nineteen hundred and twenty-four, and before they retired belonged to services or held posts which were as from the said date classified as superior services or posts, or which are declared by the Secretary of State to have been services or posts equivalent in character to services or posts so classified.

See notes under s. 258.

General provisions as to persons retiring before commencement of Part III

260.—(1) Except as otherwise expressly provided in this chapter, any pension payable to or in respect of any person, who having been appointed to a civil service of, or a civil post under, the Crown in India, retired from the service of His Majesty before the commencement of Part III of this Act shall, if it would have been payable by the Local Government in any Province if this Act had not passed, be paid out of the revenues of the corresponding Province and in any other case shall be paid out of the revenues of the Federation.

(2) Any pension payable to or in respect of any person who, having served in Burma or Aden, retired from an All-India Service, a Central Service Class I, a Central Service Class II, a Railway Service Class I, or a Railway Service Class II, before the commencement of Part III

of this Act shall be paid out of the revenues of the Federation, but save as aforesaid nothing in this section applies to any person who retired after service in Burma or Aden.

See notes under s. 258.

Miscellaneous

261. The powers conferred by this and the subsequent chapters of this Part of this Act on the Secretary of State shall not be exercisable by him except with the concurrence of his advisers. Secretary of State to act with concurrence of his advisers

Under s. 278, the Secretary of State will have a body of persons appointed by him to advise him on any matter relating to India on which he may desire their advice. It will be entirely within his discretion whether or not he consults with his advisers on any matter unless otherwise expressly provided in this Act. S. 261 provides for an exception. See J.C.R. 386.

262.—(1) The Ruler or a subject of a Federated State shall be eligible to hold any civil office under the Crown in India in connection with the affairs of the Federation, and the Governor-General may declare that the Ruler or any subject of a specified Indian State which is not a Federated State, or any native of a specified tribal area or territory adjacent to India, shall be eligible to hold any such office, being an office specified in the declaration. Eligibility for office of persons who are not British subjects.

(2) The Governor of a Province may declare that the Ruler or any subject of a specified Indian State, or any native of a specified tribal area or territory adjacent to India, shall be eligible to hold any civil office in connection with the affairs of the Province, being an office specified in the declaration.

(3) The Secretary of State may declare that any named subject of an Indian State, or any named native of a tribal area or territory adjacent to India, shall be eligible for appointment by him to any civil service under the Crown in India to which he makes appointments, and any person who, having been so declared eligible, is appointed to such a service, shall be eligible to hold any civil office under the Crown in India.

(4) Subject as aforesaid and to any other express provisions of this Act, no person who is not a British subject shall be eligible to hold any office under the Crown in India:

Provided that the Governor-General or, in relation to a Province, the Governor may authorise the temporary

employment for any purpose of a person who is not a British subject.

(5) In the discharge of his functions under this section the Governor-General or the Governor of a Province shall exercise his individual judgment.

Only British subjects are eligible to hold offices under the Crown in India, but an exception is made in the case of Rulers and subjects of Federated States, without reciprocity. See J.C.R. 367. For a period of twelve months from the date of the commencement of Part III, a person who immediately before this date was holding an office under the Crown and who is not a British subject and about whom a declaration entitling him to hold the office has not been made, is not disqualified from continuing to hold that office. See paragraph 15 (1) of the Government of India (Commencement and Transitory Provisions) Order, 1936.

Joint services and posts

263. If an agreement is made between the Federation and one or more Provinces, or between two or more Provinces, for the maintenance or creation of a service common to the Federation and one or more Provinces, or common to two or more Provinces, or for the maintenance or creation of a post the functions whereof are not restricted to the affairs of the Federation or one Province, the agreement may make provision that the Governor-General or any Governor, or any Public Service Commission, shall do in relation to that service or post anything which would under the provisions of this chapter be done by the Governor or the Provincial Public Service Commission if the service or post was a service or post in connection with the affairs of one Province only.

CHAPTER III

PUBLIC SERVICE COMMISSION

INTRODUCTION

Functions under the new Act

Speaking of the functions of the Public Service Commission, Sir Samuel Hoare said in Parliament:

> It was the definite view of the Joint Select Committee, and it is the definite view of my advisers here and in India, that the Public Service Commission had much better be advisory. Experience goes to show that they are likely to have more influence if they are advisory than if they have mandatory powers. The danger is that if you give them mandatory powers, you then set up two governments in a Province, and two governments at Centre, and there is everything to be said against a procedure of that kind. From many points of view, it is much better that they should be advisory.[1]

Under the new Act, therefore, the Public Service Commissions are purely advisory bodies and must be consulted with regard to civil services and civil posts: (*a*) on all matters relating to methods of recruitment; (*b*) on the principles to be followed in making appointments and in making promotions, and transfers from one service to another and on the suitability of candidates for such appointments, promotions and transfers; (*c*) on all disciplinary matters; and (*d*) on certain claims for costs or pensions.

Reasons for establishment

The reasons which prompted the establishment of the Public Service Commission in India have been set forth in various state papers.

The first official reference to the establishment of such a Commission is to be found in paragraph 55 of the First Despatch on the Indian Constitutional Reforms, dated 5 March 1919, which is as follows:

> In most of the Dominions where responsible government has been established, the need has been felt of protecting the public services from political influence by the establishment of some permanent office primarily charged with the regulation of service matters. We are not prepared at present to develop the case fully for the establishment in India of a Public Service Commission, but we feel that the prospect that the services may come more and more under ministerial control affords strong ground for instituting such a body.

In 1919, it was enacted in the Government of India Act that:

> There shall be established in India a Public Service Commission which shall discharge in regard to recruitment and control of the public services in India such functions as may be assigned thereto by rules made by the Secretary of State in Council.

But it was not till 1926 that the Central Public Service Commission was constituted, following on the recommendations of the Royal Commission on the Superior Services in India (commonly known as the Lee Commission)

[1] Par. Deb., Vol. 300, Col. 858.

in its Report dated 27 March 1924. The Royal Commission stressed the need for the establishment of a Public Service Commission in India in the following terms:

> Wherever democratic institutions exist, experience has shown that to secure an efficient Civil Service, it is essential to protect it as far as possible from political or personal influences and to give it that position of stability and security which is vital to its successful working as the impartial and efficient instrument by which Governments, of whatever political complexion, may give effect to their policies.
>
> In countries where this principle has been neglected and where the 'spoils' system has taken its place, an inefficient and disorganized Civil Service has been the inevitable result and corruption has been rampant.
>
> In America, a Civil Service Commission has been constituted to control recruitment of the services, but for the purpose of India, it is from the Dominions that more relevant and more useful lessons can perhaps be drawn.
>
> Canada, Australia and South Africa now possess Public or Civil Service Acts regulating the position and control of the Public Services, and a common feature of them all is the constitution of a Public Service Commission to which the duty of administering the Act is entrusted.

Central and Madras Commissions

The constitution and functions of the Central Public Service Commission established in 1926 for the All-India and the higher Central Services were laid down by statutory rules made under old s. 96C. The Simon Commission in their Report[1] summarized the powers and functions of the Public Service Commission. The Madras Service Commission was established under an Act of the Madras Legislature in 1929. In Punjab, the legislation necessary for setting up a Commission was passed, but it was not established. The provisions of the new Act providing for the establishment of the Federal and the Provincial Public Service Commissions are framed on the lines of the statutory rules made under old s. 96C.

Protection of Services in England

In Great Britain and the Dominions, where there is responsible government, the accepted principle has been that for the protection of the public services against political and personal influences, and for their efficient work, there must be a permanent body, independent of the ministers, to regulate and control such services.

Thus in England, the recruitment to the civil services is in the hands of the Civil Service Commissioners, and a minister does not deal with the matter of appointment, promotion or posting of civil servants; and in fact, since the Great War, the real control of the civil services has been in the hands of the Whitley Councils, composed of officials appointed half by Government and half by the services themselves.

In the Dominions

In the Dominions, the system is different. Here wide and ample powers of regulation and control over the public services have been given to Public Service Commissions. These powers have been conferred gradually by statute as being the only means of checking the corruption and inefficiency which resulted from unrestricted political patronage.

[1] Vol. II, par. 337.

Thus in Canada, Australia and South Africa, Public Service Commissions, instituted by statute, are responsible for all appointments, promotions and transfers in the civil services, and are the final authority in all disciplinary matters. They make an annual report on the organization and the staff of each department of the civil services.

In these countries, no control over the services is left to responsible ministers, and the grant of mandatory powers to the Public Service Commissions there does not appear to have caused confusion or conflict of powers, in spite of Sir Samuel Hoare's objections to the principle underlying such grant.

Restricted powers in India

It will be seen therefore, that in comparison with the powers and functions of the Public Service Commissions established in the Dominions, those of the Public Service Commissions constituted under the Government of India Act are very restricted. Not only are the functions of the latter purely advisory, but their advice is practically confined to questions of recruitment to the services and to disciplinary matters.

It follows therefore that, though the Public Service Commissions in India may succeed in preventing political considerations from affecting recruitment to the services, they have no power of regulation or control over the members of the services after appointment and are unable to protect them from political or other influences.

Necessity for establishment of Convention

If the Public Service Commissions in India are to carry out properly even the limited duties and functions assigned to them by the Act, it seems essential that a firm convention should be established that their advice must, save in exceptional cases, be accepted. The Simon Commission in Vol. II, paragraph 337 of their Report refer to the conventions already established as regards the Central Public Service Commission. They remark that in no single instance has the Government of India acted contrary to the advice of the Commission in making appointments; and in regard to the Commission's quasi-judicial considerations of appeals, it has been established that though the advice of the Commission is not formally binding on the Government of India, it shall be accepted save in exceptional circumstances. The Simon Commission Report recommends that the Provincial Governments should undertake to observe the same conventions in relation to the findings of the Provincial Commissions as are observed by the Government of India in its dealings with the Central Commission. The remarks of the Simon Commission as to the establishment of the convention are based on the letter from the Government of India in July 1927 addressed to all local Governments to the effect that with the approval of the Secretary of State in Council, the Government of India had decided to establish a convention that the advice of the Federal Public Service Commission shall, save in exceptional circumstances, be accepted in (1) quasi-judicial cases, e.g. disciplinary cases and interpretation of existing conditions of service; and (2) selections for appointment of candidates by nomination, subject to any special directions that may be given to the Commission regarding the class of candidates to be nominated. It was further stated in the letter that though as then constituted, the Commission was merely an advisory body, the Government of India considered that if it was to fulfil the objects for which it was brought into existence, it should be given a measure of authority which, without unduly derogating from the constitutional position of Government, should assure the services of an impartial and disinterested decision in matters vitally affecting their welfare.

Extension of Powers

In view of the experience of the Dominions, it seems likely that the question of extending the powers and functions of the Public Service Commissions in India will arise before long.

Public Service Commissions

Public Service Commissions

264.—(1) Subject to the provisions of this section, there shall be a Public Service Commission for the Federation and a Public Service Commission for each Province.

(2) Two or more Provinces may agree—

(*a*) that there shall be one Public Service Commission for that group of Provinces; or

(*b*) that the Public Service Commission for one of the Provinces shall serve the needs of all the Provinces,

and any such agreement may contain such incidental and consequential provisions as may appear necessary or desirable for giving effect to the purposes of the agreement and shall, in the case of an agreement that there shall be one Commission for a group of Provinces, specify by what Governor or Governors the functions which are under this Part of this Act to be discharged by the Governor of a Province are to be discharged.

(3) The Public Service Commission for the Federation if requested so to do by the Governor of a Province may, with the approval of the Governor-General, agree to serve all or any of the needs of the Province.

(4) References in this Act to the Federal Public Service Commission or a Provincial Public Service Commission shall, unless the context otherwise requires, be construed as references to the Commission serving the needs of the Federation or, as the case may be, the Province as respects the particular matter in question.

Composition and staff of Commissions

265.—(1) The chairman and other members of a Public Service Commission shall be appointed in the case of the Federal Commission, by the Governor-General in his discretion, and in the case of a Provincial Commission, by the Governor of the Province in his discretion:

Provided that at least one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years under the Crown in India.

(2) In the case of the Federal Commission, the Governor-General in his discretion and, in the case of a

Provincial Commission, the Governor of the Province in his discretion may by regulations—

(*a*) determine the number of members of the commission, their tenure of office and their conditions of service; and

(*b*) make provision with respect to the numbers of staff of the commission and their conditions of service.

(3) On ceasing to hold office—

(*a*) the chairman of the Federal Commission shall be ineligible for further employment under the Crown in India;

(*b*) the chairman of a Provincial Commission shall be eligible for appointment as the chairman or a member of the Federal Commission, or as the chairman of another Provincial Commission, but not for any other employment under the Crown in India;

(*c*) no other member of the Federal or of any Provincial Commission shall be eligible for any other appointment under the Crown in India without the approval, in the case of an appointment in connection with the affairs of a Province, of the Governor of the Province in his discretion and, in the case of any other appointment, of the Governor-General in his discretion.

Under Cl. (2) of this section, the Governor-General has made the Federal Public Service Commission (Conditions of Service) Regulation, Gazette of India Extraordinary, dated 1 April 1937, p. 370. Corresponding Regulations have been made by the Provincial Governors.

Functions of Public Service Commissions

266.—(1) It shall be the duty of the Federal and the Provincial Public Service Commissions to conduct examinations for appointments to the services of the Federation and the services of the Province respectively.

(2) It shall also be the duty of the Federal Public Service Commission, if requested by any two or more Provinces so to do, to assist those Provinces in framing and operating schemes of joint recruitment for their forest services, and any other services for which candidates possessing special qualifications are required.

(3) The Secretary of State as respects services and posts to which appointments are made by him, the Governor-

General in his discretion as respects other services and posts in connection with the affairs of the Federation, and the Governor in his discretion as respects other services and posts in connection with the affairs of a Province, may make regulations specifying the matters on which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted but, subject to regulations so made and to the provisions of the next succeeding subsection, the Federal Commission or, as the case may be, the Provincial Commission shall be consulted—

(*a*) on all matters relating to methods of recruitment to civil services and for civil posts ;

(*b*) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers ;

(*c*) on all disciplinary matters affecting a person serving His Majesty in a civil capacity in India, including memorials or petitions relating to such matters ;

(*d*) on any claim by or in respect of a person who is serving or has served His Majesty in a civil capacity in India that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the revenues of the Federation or, as the case may be, the Province ;

(*e*) on any claim for the award of a pension in respect of injuries sustained by a person while serving His Majesty in a civil capacity in India, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the Governor-General in his discretion, or, as the case may be, the Governor in his discretion, may refer to them.

(4) Nothing in this section shall require a Public Service Commission to be consulted as respects the manner in which appointments and posts are to be allocated as

between the various communities in the Federation or a Province or, in the case of the subordinate ranks of the various police forces in India, as respects any of the matters mentioned in paragraphs (*a*), (*b*) and (*c*) of subsection (3) of this section.

See the Federal Public Service (Consultation by the Governor-General) Regulation, Gazette of India Extraordinary, 1 April 1937, p. 376. Corresponding Regulations have been made by the Provincial Governors.

The Secretary of State, acting under Cl. (3), has to act with the concurrence of his advisers. See s. 261.

Civil services and posts: As distinguished from military service and military posts. Part X, Chapter I deals with defence (or military) services, and Chapter II with civil services. S. 233 refers to the control of His Majesty over defence appointments. An officer in His Majesty's Forces is not the holder of a civil post. See s. 267 (*b*) (i). It is not necessary for the holder of a civil post that he should be a whole-time official. A Government pleader or a medical man in Government service, who is allowed private practice, is a holder of a civil post.

267. Subject to the provisions of this section, an Act of the Federal Legislature or the Provincial Legislature may provide for the exercise of additional functions by the Federal Public Service Commission or, as the case may be, by the Provincial Public Service Commission: Power to extend functions of Public Service Commissions

Provided that—

(*a*) no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, or, as the case may be, of the Governor in his discretion; and

(*b*) it shall be a term of every such Act that the functions conferred by it shall not be exercisable—

(i) in relation to any person appointed to a service or a post by the Secretary of State or the Secretary of State in Council, any officer in His Majesty's Forces, or any holder of a reserved post, except with the consent of the Secretary of State; or

(ii) where the Act is a provincial Act, in relation to any person who is not a member of one of the services of the Province, except with the consent of the Governor-General.

Expenses of Public Service Commissions

268. The expenses of the Federal or a Provincial Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the revenues of the Federation or, as the case may be, the Province :

Provided that nothing in this section shall charge on the revenues of a Province any pension which is by virtue of the provisions of chapter II of this Part of this Act charged on the revenues of the Federation.

The expenses of the Public Service Commission being charged on the revenues of the Federation or of the Province, are not to be submitted to the vote of the Legislature. See ss. 34(1) and 79(1).

Convention :[1] A convention that the advice of the Provincial Public Service Commission should always be accepted, save in exceptional circumstances, appears to have already been adopted by the Governments of Bombay, Punjab, Madras, and the N.-W.F. Province. This will presumably also apply to the order in which the names of selected candidates are sent up by the Commission.

Consultations with the Commission: See s. 242(2) re. railway recruitments; s. 242(4) re. appointments to staff of Federal, or High, Court; s. 265 re. joint services and posts; and s. 266(2) re. joint recruitments to forest services, etc.

[1] See p. 423.

CHAPTER IV

CHAPLAINS

Provisions as to chaplains

269.—(1) There may, as heretofore, be an establishment of chaplains to minister in India to be appointed by the Secretary of State and the provisions of chapter II of this Part of this Act shall, with any necessary modifications, apply in relation to that establishment and to persons appointed as chaplains by the Secretary of State or by the Secretary of State in Council, as they apply in relation to the civil services to which appointments are to be made by the Secretary of State and to persons appointed to a civil service under the Crown in India by the Secretary of State or by the Secretary of State in Council, and for the purposes of the provisions of chapter II relating to persons who retired before the commencement of Part III of this Act the said establishment shall be deemed to be an all-India service.

(2) So long as an establishment of chaplains is maintained in the Province of Bengal, two members of that establishment in the Province must always be ministers of the Church of Scotland and shall be entitled to have out of the revenues of the Federation such salary as is from time to time allotted to the military chaplains in that Province.

This subsection applies to the Province of Madras and to the Province of Bombay as it applies to the Province of Bengal.

(3) The ministers of the Church of Scotland so appointed chaplains must be ordained and inducted by the Presbytery of Edinburgh according to the forms and solemnities used in the Church of Scotland, and shall be subject to the spiritual and ecclesiastical jurisdiction in all things of the Presbytery of Edinburgh, whose judgments shall be subject to dissent, protest and appeal to the Provincial synod of Lothian and Tweeddale and to the General Assembly of the Church of Scotland.

See notes to s. 11 under ECCLESIASTICAL AFFAIRS, J.C.R., 185-86, old Act ss. 122-23. The Indian Church Act 1927 [1] and the Indian Church Measure 1927 have made the Indian church autonomous, repealing ss. 115-21 of the old Act. The Joint Committee point out that the

[1] 17 & 18 Geo. 5, c. 40.

Indian church must in course of time come to depend less and less upon Government assistance, whether in the form of the provision of official chaplains or of grants in aid for the maintenance of non-official chaplains or churches. But any sudden or unreasonable curtailment of Government assistance might greatly embarass the new autonomous Indian church. The ecclesiastical expenditure has been gradually reduced. The Joint Committee recommend that the Act should fix a maximum figure for such expenditure. At present the whole of the expenditure for official chaplains who are mainly employed to minister the spiritual needs of the Army, is classified as civil expenditure. But the Joint Committee suggest that ecclesiastical expenditure for Army purposes should be classed under defence expenditure.

CHAPTER V

INTRODUCTION

THE RULE OF LAW AND ACT OF STATE

The Rule of Law. The Rule of Law is generally applicable in India subject to the exceptions mentioned in the Government of India Act. It means that the executive has no arbitrary power over the subject who possesses certain rights which cannot be invaded by administrative action without his having the right to invoke the aid of the courts; and secondly, it involves the general principle of equality before the law in the sense that all persons are subject to the same law and are subject to the jurisdiction of the same tribunals. The courts in India have always asserted their control over the executive. This means that any action of the Government under a municipal statute may be investigated in the courts (unless, of course, the jurisdiction of the civil courts is specifically excluded by Statute, as it has done in matters affecting the revenue).[1] In *Dhackjee* v. *East India Co.* (1843)[2] it was clearly pointed by the Chief Justice of Bombay that the Governor in Council had no power to set aside the ordinary rules of law and rights of individuals; 'Governors and Council have not, by virtue of their appointment, the Sovereign authority delegated to them and acts on their own authority, unauthorized by their commissions or by statutes or expressly or impliedly by instructions, are not equivalent to such acts being done by the Crown and are invalid.'[3] Public officers, therefore, cannot plead the orders of a superior as an exemption of liability for an illegal act, save in so far as the Act excludes the heads of governments from the jurisdiction of the Indian courts.[4] The liability is personal, and the Secretary of State in Council (now the Federation or the Provinces) is not liable for the default or the negligence of public servants.[5] No claim can be sustained, if a man be arrested and convicted, for such action is a matter of judicial procedure.[6] Where, however, an official may be liable, the Act confers a considerable measure of protection for acts done in good faith, and no gazetted officer can be proceeded against without the sanction of the Government.[7]

It is not clear whether the Government is liable for the tortious action of public servants. In some cases, the liability is statutory, and where the Government carries on non-sovereign activities it is liable for the action of its servants. In *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India*[8] it was held that damages could be

1 See s. 226: *Vijaya Ragava* v. *Secretary of State for India* (1884) 7 Mad. 466.

2 Morley Digest II, 307, 311.

3 At pp. 311-312.

4 See s. 306.

5 *Shivabhajan* v. *Secretary of State* (1904) 28 Bom. 314; *Ross* v. *Secretary of State* (1914) 37 Mad. 55.

6 *Mata Prasad* v. *Secretary of State* (1930) 5 Luck. 157.

7 See s. 197 of the Indian Code of Criminal Procedure and ss. 80-82 of the Indian Code of Civil Procedure; see also s. 271 of this Act and notes thereto.

8 (1868) 5 Bom. H.C.R. App. A.

claimed against the Secretary of State for injury done by the negligence of dockyard officials. But no government is liable for torts committed by public servants in course of duty in a governmental function.[1] The distinction between sovereign power and power exercisable by private individuals is that in the former case no question of consideration comes in, whereas the essence of the latter is that some profit is secured or some special injury is inflicted in the exercise of the individual right; and it was held in the case referred to, that the making and maintenance of roads was a governmental or sovereign function. It was further held that the principle that the Crown can be sued only for remedies contemplated by the Petition of Right is confined in its operation to the United Kingdom, and a general liability for torts is dependent upon the law of the particular dominion wherein the action is instituted. The liability of an individual officer remains unaffected, unless he can plead statutory exemption. In matters of contract, public servants are not liable as they are acting for the Government and not for themselves. The Act provides that direct suit will lie against the government concerned, and in certain cases the Secretary of State may be sued in England. Such cases include contract relating to land.[2] An action will also lie to recover sums which have reached the heads of the Government because improperly levied by a collector of revenue.[3]

The jurisdiction of the courts is also excluded in respect of those proceedings which are called *Acts of State*. These matters are outside the normal sphere of law. The term 'Act of State' means an act of the Executive as a matter of policy performed in the course of relation with another state. Such matters are not subject to the jurisdiction of the municipal courts. In *Nabob of the Carnatic* v. *East India Co.*,[4] it was held that no English court would deal with a claim based, not on a business contract, but on a treaty with a sovereign state which fell outside municipal jurisdiction. It has also been held that there is no jurisdiction in respect of claims against the Crown, as successor to a state annexed, on the score of annexation.[5] On the same principle, political dealings with Indian States have been held to be outside the sphere of the courts. It was held that no court would intervene against the action of the Indian Government in deposing the Maharaja of Panna.[6] In *Hemchand Devchand* v. *Azam Sekarlal*[7] it was held that the jurisdiction of political officers in Kathiwar State is political, not judicial.

The plea of Act of State will not avail to protect a person accused of an unlawful act. If the Government needs, in order to cope with emergency, greater powers than the law allows, these powers must be obtained from the legislature, or if need be, retrospective legality must be given to measure taken in an emergency by Indemnity Acts. But no official

[1] *Secretary of State for India* v. *Cockraft* (1916) 39 Mad. 351; *Jehangir Cursetji* v. *Secretary of State* (1903) 27 Bom. 189.

[2] *Kishen Chand* v. *Secretary of State* (1881) 3 All. 829; *Forrester* v. *Secretary of State* (1872) L.R.I.A. Supp. 10.

[3] *Hari Bhanji* v. *Secretary of State* (1882) 5 Mad. 273.

[4] (1791) 1 Ves Jr. 371; (1793) 2 Ves Jr. 56.

[5] *East India Co.* v. *Syed Ally* (1827) 7 Moo. Ind. App. 555. *Doss* v. *Secretary of State* (1875) 19 Eq. 509; *Rajah Seligram* v. *Secretary of State* (1872) I.A. Supp., 119; *Secretary of State* v. *Kamachee Boye Saheba* (1859) 13 Moo. P.C. 22: 7 Moore Ind. App. 476; *Sirdar Bhagavan Singh* v. *Secretary of State* (1874) 2 I.A. 38.

[6] *Maharaja Madhava Singh* v. *Secretary of State* (1904) 31 I.A. 239.

[7] [1906] A.C. 212.

can be heard to say in a court of law in answer to the claim of a subject, that his act was that of the sovereign power and therefore cannot be questioned, unless the act can be justified as falling within the prerogative or statutory powers of the Government. But the plea of Act of State can be raised as a defence to an action brought against a servant of the Crown by a subject of a foreign state for injury done to him or his property, provided that the act of which the foreign plaintiff complains was committed on a foreign territory and the Act was authorized or subsequently ratified by the Crown. An alien enemy is not permitted to sue in an English court.[1] In *Civilian War Claimants' Association* v. *The King*,[2] no claim by subjects to sums payable to the State as reparations under the Treaty of Versailles, 1919, was allowed. Acts resulting from a treaty of cession, or by reason of annexation of territory fall in this class. Such acts may confer a title to property on the Crown which must be accepted by municipal law.[3] But such a defence is not available against a British subject,[4] nor against an alien, the subject of a friendly state, resident on British territory.[5] Any person whether he be a private individual or a public officer, who interferes without legal justification with rights of the subject renders himself liable to an action in tort. He can only plead the defences which the law allows, and state necessity is no defence to the servant of the Crown despite the immunity which the Crown itself enjoys and such statutory protections as an official may find.

GENERAL

270.—(1) No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion. Indemnity for past acts

(2) Any civil or criminal proceedings instituted, whether before or after the coming into operation of this Part of this Act, against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date shall be dismissed unless the court is satisfied that the acts complained of were not done in good faith, and, where any such proceedings are dismissed the costs incurred by the defendant shall, in so far as they are

[1] *Porter* v. *Freudenberg* [1915] 1 K.B. 857.
[2] [1932] A.C. 14.
[3] *West Rand Central Gold Mining Co.* v. *The King* [1905] 2 K.B. 391.
[4] *Walker* v. *Baird* [1892] A.C. 491.
[5] *Johnstone* v. *Pedler* [1921] 2 A.C. 262.

not recoverable from the persons instituting the proceedings, be charged, in the case of persons employed in connection with the functions of the Governor-General in Council or the affairs of Burma, on the revenues of the Federation, and in the case of persons employed in connection with the affairs of a Province, on the revenues of that Province.

(3) For the purposes of this section—

the expression 'the relevant date' means, in relation to acts done by persons employed about the affairs of a Province or about the affairs of Burma, the commencement of Part III of this Act and, in relation to acts done by persons employed about the affairs of the Federation, the date of the establishment of the Federation;

references to persons employed in connection with the functions of the Governor-General in Council include references to persons employed in connection with the affairs of any Chief Commissioner's Province;

a person shall be deemed to have been employed about the affairs of a Province if he was employed about the affairs of the Province as constituted at the date when the act complained of occurred or is alleged to have occurred.

The Joint Committee in paragraph 283 of their Report deal with the question of indemnity to government servants for acts done before the commencement of Part III of this Act. They approve of the White Paper proposal that there should be a full indemnity against civil and criminal proceedings in respect of all acts done before that date by a public servant in good faith and done or purported to be done in the execution of duty. This protection is reasonable in view of threats held out against persons who have done no more than their duty in very difficult and trying circumstances. Proceedings in respect of acts done before 1 April, 1937, when Part III comes into operation (called the relevant date) must be instituted with the consent of the Governor-General or the Governor, and the action is to be dismissed unless the court finds that the acts complained of were not done in good faith. When the suit is dismissed, all the costs incurred by the defendant not recoverable from the complainant or the plaintiff, are charged on the revenues of the Federation or of the Province, as the case may be. See note on THE RULE OF LAW.

Protection of public servants against prosecution and suits

271.—(1) No Bill or amendment to abolish or restrict the protection afforded to certain servants of the Crown in India by section one hundred and ninety-seven of the Indian Code of Criminal Procedure, or by sections eighty

to eighty-two of the Indian Code of Civil Procedure, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(2) The powers conferred upon a Local Government by the said section one hundred and ninety-seven with respect to the sanctioning of prosecutions and the determination of the court before which, the person by whom and the manner in which, a public servant is to be tried, shall be exercisable only—

(*a*) in the case of a person employed in connection with the affairs of the Federation, by the Governor-General exercising his individual judgment; and

(*b*) in the case of a person employed in connection with the affairs of a Province, by the Governor of that Province exercising his individual judgment;

Provided that nothing in this subsection shall be construed as restricting the power of the Federal or a Provincial Legislature to amend the said section by a Bill or amendment introduced or moved with such previous sanction as is mentioned in subsection (1) of this section.

(3) Where a civil suit is instituted against a public officer, within the meaning of that expression as used in the Indian Code of Civil Procedure, in respect of any act purporting to be done by him in his official capacity, the whole or any part of the costs incurred by him and of any damages or costs ordered to be paid by him shall, if the Governor-General exercising his individual judgment so directs in the case of a person employed in connection with the affairs of the Federation, or if the Governor exercising his individual judgment so directs in the case of a person employed in connection with the affairs of a Province, be defrayed out of and charged on the revenues of the Federation or of the Province, as the case may be.

S. 197 of the Code of Criminal Procedure provides:

(1) When any person who is a judge within the meaning of s. 19 of the Indian Penal Code or when any magistrate or when any public servant who is not removable from his office save by or with the sanction of a local Government or some

higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties, no court shall take cognizance of such offence except with the previous sanction of the local Government.

(2) Such Government may determine the person by whom, and the manner in which, the prosecution of such judge, magistrate or public servant is to be conducted and may specify the court before which the trial is to be held.

Under the provisions of s. 271 of the new Act, powers conferred upon the local Government are to be exercised by the Governor-General or the Governor in his individual judgement.

'Public servant' is explained in s. 21 of the Indian Penal Code. The class of public servants protected by s. 197 of the Indian Code of Criminal Procedure is more restricted.

The Code does not prescribe any particular form of sanction and non-specification of the place in which and the occasion on which the offence was committed does not affect the validity of the sanction. A sanction under the Code is not void for want of notice to the accused to show cause why it should not be given. The giving of such opportunity is entirely at the discretion of the sanctioning authority and the court before which he is prosecuted is not an appellate authority over the Government in the matter of sanction. There is no provision of law empowering the Government or an officer of the Government to hold a judicial enquiry in order to ascertain whether or not, he ought to grant sanction under this section. The Government officer giving sanction will act purely in an executive, and not judicial, capacity, and the sanction need not be based on judicial evidence. But the sanction must be obtained before any proceedings are taken.

The power given by this section and s. 197 (2) of the Code of Criminal Procedure overrides the general rule contained in s. 177 of the Code that an offence shall be ordinarily tried by a court within the local limits of whose jurisdiction it was committed. Where the local Government has specified a particular court, such specification will supersede all power of transfer conferred on the High Court under s. 526.

Sections 80 to 82 of the Indian Code of Civil Procedure (Act V of 1908) are as follows:

80. No suit shall be instituted against the Secretary of State for India in Council or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to or left at the office of a Secretary to the local Government or the Collector of the district, and in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

81. In a suit instituted against a public officer, in respect of any act purporting to be done by him in his official capacity——

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and

(b) where the court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

82.—(1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

The suits referred to in these sections are suits against the public officer personally in respect of acts done in his official capacity. The object of notice required in s. 80 is to give the public officers an opportunity to reconsider their legal position and to make amends or settle the claim, if so advised, without litigation. Notice must be given after (and not before) the accrual of cause of action and is obligatory in all suits. The section admits of no implications or exceptions.[1] The High Court of Bombay had held in a series of cases that the requirement of notice was limited to suits on tort and that no notice was necessary in suits founded on contract.[2] But in *Prasad Das* v. *K. S. Bonnerjee*[3] Rankin, C.J., said, 'It is no doubt, broadly speaking, true that such a section as this is not intended to apply to actions *ex-contractu*, and there are other classes of action no doubt which do not come within the meaning of the expression "in respect of any act purporting to be done by such public officer in his official capacity"'.

Where notice of a proposed suit is once given, it is not necessary to give a fresh notice of two months, if the plaint has to be amended. But no amendment will be allowed if the effect of the amendment is to convert the suit into another of a different character. In such a case a fresh suit must be brought after giving notice as required in s. 80.

272. Any pension payable to or in respect of a person who— Provisions as to payment of certain pensions and exemption of those pensions from taxation in India

(a) before the commencement of Part III of this Act had served His Majesty in India, Burma or Aden, or elsewhere under the Governor-General in Council; or

[1] *Bhagchand* v. *Secretary of State* (1927) 54 I.A. 338.

[2] *Rajumal* v. *Hanmant* (1896) 20 Bom. 697; *Cecil Grey* v. *the Cantonment Committee of Poona* (1910) 34 Bom. 583. *Sardar Singh* v. *Gampat* (1890) 14 Bom. 395.

[3] (1930) 57 Cal. 1127.

(*b*) after the commencement of Part III of this Act—

(i) serves in India as an officer of His Majesty's forces, or

(ii) is appointed to a civil service of, or to an office or post under, the Crown in India by His Majesty or the Secretary of State; or

(iii) holds a reserved post

shall, if the person to whom the pension is payable is residing permanently outside India, be paid on behalf of the Federation or the Province, as the case may be, by, or in accordance with arrangements made with, the Secretary of State, and be exempt from all taxation imposed by or under any existing Indian law, or any law of the Federal or of a Provincial Legislature.

Pension payable to a person residing permanently outside India is to be exempt from all Federal or Provincial taxation.

Provisions as to family pension funds

273.—(1) His Majesty may by Order in Council provide for the vesting in Commissioners to be appointed under the Order of—

(*a*) the Indian Military Widows and Orphans Fund;

(*b*) the Superior Services (India) Family Pension Fund;

(*c*) a fund to be formed out of the moneys contributed and to be contributed under the Indian Military Service Family Pension Regulations for the purpose of paying pensions payable under those regulations;

(*d*) a fund to be formed out of the moneys contributed and to be contributed under the Indian Civil Service Family Pension Rules for the purpose of paying pensions payable under those rules,

for the investment of the said funds by the Commissioners, in such manner as, subject to the provisions of the Order, they think fit, for the administration of the said funds in other respects by the Secretary of State, for the remuneration of the Commissioners out of the said funds, and for any other matters incidental to or consequential on the purposes of the Order; and if any such Order is made, then, as from such date as may be specified in the Order, any pensions payable under the said regulations and

rules, shall, subject to the provisions of subsection (3) of this section be payable out of the appropriate fund in the hands of the Commissioners, and not otherwise.

Before recommending His Majesty to make any Order in Council under this subsection, the Secretary of State shall consider any representations made to him by any of the existing subscribers and beneficiaries or by any persons appearing to him to represent any body of those subscribers or beneficiaries.

(2) Any such Order as aforesaid shall provide that the balance in the hands of the Governor-General on the thirty-first day of March next following the passing of this Act in respect of the Indian Military Widows and Orphans Fund and the Superior Services (India) Family Pensions Fund, and in respect of the moneys theretofore contributed under the Indian Military Service Family Pension Regulations and the Indian Civil Service Family Pension Rules shall, subject to the provisions of subsection (3) of this section, be transferred to the Commissioners before the expiration of three years from the said date either all at one time or by instalments, together with such interest as may be prescribed by or under the Order:

Provided that His Majesty in Council may, if it appears to him necessary so to do, extend the said period of three years.

(3) Any such Order as aforesaid shall provide for the making of objections by and on behalf of existing subscribers and beneficiaries to the vesting of any such fund as aforesaid in the Commissioners and, if any objection is so made in the manner and within the time limited by the Order—

(*a*) so much of any money in the hands of the Governor-General as represents the interest of the objector shall not be transferred to the Commissioners, but shall be dealt with as part of the revenues of the Federation; and

(*b*) in lieu of any pensions which might be payable out of the said funds to or in respect of the objectors there shall be payable out of the revenues of the Federation to and in respect of the said persons such pensions on such conditions as may be specified in rules to be made by the Secretary of State.

(4) Any such Order as aforesaid may, notwithstanding anything in this Part of this Act or in the regulations

or rules relating to the fund in question, provide for the making of such alterations in any pensions payable out of the fund to which the Order relates as may be reasonably necessary in consequence of the transfer effected under the Order.

(5) Any interest or dividends received by the Commissioners on sums forming part of any fund vested in them under this section shall be exempt from income-tax in the United Kingdom, and estate duty shall not be payable in Great Britain, nor, if the Parliament of Northern Ireland so provides, in Northern Ireland, in respect of any pension payable under the regulations or rules relating to any such fund.

(6) In this section—

references to the Indian Military Service Family Pension Regulations or the Indian Civil Service Family Pension Rules shall be construed as including references to any regulations or rules which may be substituted therefor;

the expression 'existing subscribers and beneficiaries' means in relation to the Indian Military Widows and Orphans Fund and the Superior Services (India) Family Pension Fund persons who have subscribed to, or are to have been in receipt of pensions from, those funds, and, in relation to the funds to be formed out of the moneys contributed under the Indian Military Service Family Pension Regulations and the Indian Civil Service Family Pension Rules, persons who have contributed under, or are or have been in receipt of pensions payable under, the regulations or rules, not being persons who have surrendered or forfeited their interest in the fund or, as the case may be, their interest under the regulations or rules;

references to pensions payable under the said regulations or the said rules do not include references to any pension or portion of a pension payable otherwise than out of the moneys contributed and to be contributed under those regulations or rules;

references to moneys so contributed, or to be so contributed, include references to interest upon such moneys.

(7) Notwithstanding anything in this Act, and in particular notwithstanding the separation of Burma and

after the commencement of Part III of this Act, be done by or to the Secretary of State, and for any reference in the said Acts to the revenues of India there shall be substituted a reference to the revenues of the Federation.

Persons not to be disqualified by sex for holding certain offices

275. A person shall not be disqualified by sex for being appointed to any civil service of, or civil post under, the Crown in India other than such a service or post as may be specified by any general or special order made—

(*a*) by the Governor-General in the case of services and posts in connection with the affairs of the Federation;

(*b*) by the Governor of a Province in the case of services and posts in connection with the affairs of the Province;

(*c*) by the Secretary of State in relation to appointments made by him:

Provided that any such agreement with respect to joint services and posts as is mentioned in chapter II of this Part of this Act may provide for the powers conferred by this section on the Governor-General and the Governor of a Province being exercised, with respect to the services or posts to which the agreement applies, by the Governor-General or a specified Governor.

Transitional provisions

276. Until other provision is made under the appropriate provisions of this Part of this Act, any rules made under the Government of India Act relating to the civil services of, or civil posts under, the Crown in India which were in force immediately before the commencement of Part III of this Act, shall, notwithstanding the repeal of that Act, continue in force so far as consistent with this Act, and shall be deemed to be rules made under the appropriate provisions of this Act.

Until provisions are made under the new Act, the rules made under the old Act relating to the civil services under the Crown in India and in force just before the commencement of Part III of the Act shall continue to be in force after that date and are to be regarded as made under the new Act.

Interpretation, etc.

277.—(1) In this Part of this Act—

the expression 'all-India Service,' 'Central Service Class I,' 'Central Service Class II,' 'Railway Service Class I,' 'Railway Service Class II' and

'Provincial Service' mean respectively the services which were immediately before the commencement of Part III of this Act, so described respectively in the classification rules then in force under section ninety-six B of the Government of India Act; and

references to dismissal from His Majesty's service include references to removal from His Majesty's service.

(2) References in this Part of this Act to persons appointed to a civil service of, or a civil post under, the Crown in India—

(*a*) include references to persons who, after service in India, Burma, or Aden, retired from the service of His Majesty before the commencement of Part III of this Act;

(*b*) do not include references to persons so appointed who, after the commencement of Part III of this Act, become members of a civil service of, or hold civil posts under, the Crown in Burma or Aden.

(3) The inclusion in this Part of this Act of provisions expressly requiring the Governor-General or a Governor to exercise his individual judgment with respect to any matter shall not be construed as derogating from the special responsibility of the Governor-General and the Governors for the securing to, and to the dependants of, persons who are or have been members of the public services of any rights provided or preserved for them by or under this Act and the safeguarding of their legitimate interests.

Cl. (*1*) *:* These expressions have been used in s. 258.

Cl. (*3*) *:* The various references in Part X to the exercise of individual judgement in no way cut across the effect of ss. 12 (2) and 52 (3). The object of inserting this clause is to make the position quite clear. See ss. 12 (1) (*d*) and 52 (1) (*c*) as to the special responsibility of the Governor-General and the Governor.

PART XI

THE SECRETARY OF STATE

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THE SECRETARY OF STATE

INTRODUCTION

The office of the Secretary of State for India and the Council of India were created by the Act of 1858, when there passed to them the authority formerly exercised by the Board of Control under Pitt's Act of 1784 as well as the functions of the Court of Directors of the East India Company. The Secretary of State for India, a member of the British Cabinet, is the immediate agent of Parliament for the discharge of its responsibilities in Indian affairs and the old Act prescribes his powers and so defines the sphere in which he may be held to account by Parliament. Parliament maintains its control over the Government of India through the Secretary of State, and the powers conferred upon him by the Government of India Act determine the limit within which the control of Parliament is, or could be, exercised. The Secretary of State was authorized by the old Act to superintend, direct and control all acts, operations and concerns which relate to the Government or the revenues of India; and the Governor-General and through him, the Provincial Governments, were required to pay due obedience to the orders of the Secretary of State. The chain of constitutional responsibility was, however, complicated by the existence of the Council of India, which was associated with the Secretary of State in his duties and which had independent powers in certain important matters.

The Council of India

The Secretary of State was assisted by a Council, called the Council of India, consisting of not less than eight and not more than twelve members, appointed by the Secretary of State for a term of five years, and half of them must be persons who have long and recent experience of India. A member of the Council can only be removed from his office by His Majesty on an address of both Houses of Parliament. The Secretary of State was to be the President of the Council and had power to appoint a Vice-President. The duty of the Council of India was to conduct, under the direction of the Secretary of State, business transacted in the United Kingdom in relation to the Government of India. The Secretary of State for India in Council was the only authority for raising loans in England for the purpose of the Government of India. In any suit, whether in India or elsewhere, to which the Government of India or local Government was a party, the proceedings must be in the name of the Secretary of State for India in Council.[1] Except in the following cases where the old Act required the concurrence of a majority of vote of a meeting of the Council of India, the Secretary of State had the right to overrule the opinion of his Council:

(1) Grants or appropriations of any part of the revenues of India;
(2) the sale or disposal of real or personal estate and the raising of money thereon by mortgage or otherwise;
(3) the making of contracts, including instruments of contract, of civil offices in India;

[1] See s. 32 of the old Act.

(4) the application to the Government of India and the local Governments of authority to perform on behalf and in the name of the Secretary of State in Council any of the obligations on the last two heads ;
(5) the passing of any order affecting the salaries of members of the Governor-General's Council ;
(6) the making of rules regulating various matters connected with the Indian Public Services ;
(7) the framing of rules regarding military appointments and appointment of Indians to reserved posts.

But the Council never had any power of initiating action or expenditure ; it could only consider proposals put before it by the Secretary of State. The relations between the Secretary of State in Council and the Government of India are thus described in the Report of the Simon Commission :[1]

> The statutory control of the Secretary of State in Council is still in theory complete within the field left to them by the Act of 1919. But for various reasons it is exercised in practice to an extent very much less than a literal interpretation of the Act would warrant . . . The essential process of delegation had gone on. intermittently for many years before the Reforms but the policy underlying the Act of 1919 gave it a strong impetus. Delegation, it will be understood, differs from a statutory devolution of powers in that it does not relieve the Secretary of State from his responsibility to Parliament ; he takes the risk of trusting a subordinate authority to decide matters for which by statute he remains responsible.

The Secretary of State in Council also controlled the expenditure by the Government of India. The rules delegating financial powers have never been matters for which sanction is not required ; they prescribe the exceptional matters in regard to which sanction is necessary. The abolition or creation of posts, for example, carrying more than a certain rate of pay required the Council's sanction. As an indication of the limits of purely financial control, rules were framed which required sanction for the revision of permanent establishments, if the additional recurring cost is over Rs.15 lakhs, and for capital expenditure exceeding Rs.50 lakhs on such matters as irrigation or railway projects.

The Fiscal Convention

The Joint Select Committee on the Government of India Act of 1919 suggested a form of delegation of the statutory powers of the Secretary of State of an entirely different character. They recommended that the Secretary of State should as far as possible avoid interference in India's fiscal policy when the Government of India and its Legislature are in agreement and that his interference when it does take place, should be limited to safeguarding the international obligation of the Empire or any fiscal arrangements within the Empire to which His Majesty's Government is a party. Liberty was granted by convention to the Government of India to devise tariff measures with the concurrence of the Indian Legislature. This is known as the Fiscal Convention and it is now the settled policy that the Secretary of State does not interfere with the enactment of any tariff measure upon which the Government of India and its Legislature are

[1] See Vol. I, par. 264.

agreed, except when he considers that the measure cuts across general Empire policy. See notes to s. 11 under FISCAL CONVENTION.

An understanding analogous to the fiscal convention had also been arrived at in another region. The Secretary of State has relinquished his control of policy in the matter of the purchase of Government stores for India, other than military stores. The Governments in India in agreement with the Legislatures, are now free to buy stores in India, in the United Kingdom or abroad as seems best to them, and the Secretary of State does not ordinarily intervene. Beyond these two regions, there was no delegation by convention.

Changes under the new Act

The new Act modifies considerably the range and the extent of the powers of the Secretary of State. The Secretary of State in Council as a body corporate by statute will cease to exist on the constitution coming into effect, and the Council as existing immediately before the commencement of Part III of Act (the establishment of Provincial Autonomy) shall be dissolved and then, under the provisions of s. 2, 'any rights, authority and jurisdiction . . . . heretofore exercisable in or in relation to any territories in India by the Secretary of State or the Secretary of State in Council shall vest in the Crown. On the dissolution of the Secretary of State in Council' as a statutory corporation with sole final authority over all Indian expenditure, the rights, liabilities and obligations incurred by the Secretary of State in Council by contract or otherwise will be transferred to the appropriate authority, the Federal Government, the Provincial Government or the Railway Authority as the case may be. Existing rights of suit and arbitration in the United Kingdom are, however, preserved against the Secretary of State as the successor of the Secretary of State in Council in respect of these liabilities. See Introduction to Part VIII, Chapter III. The accounts of the Secretary of State in Council with the Bank of England will also be transferred to the Secretary of State. For the legal consequences of the dissolution of the Secretary of State in Council, see Introduction, Part VIII, Chapter III.

Although the Council is dissolved, the Secretary of State will continue to be the Crown's responsible agent for the exercise of all authority vested in the Crown in relation to the affairs of India. He is a member of the British Cabinet and of Parliament, to which bodies he is responsible for all his actions. As the Act provides only for a partial transfer of responsibility to the Indian Legislatures, the control of the Secretary of State is restricted to the administration of subjects in the reserved sphere. In the nature of things, the executive must remain responsible either to the British Parliament or to the Indian Legislature, or partly to the one and partly to the other. To the extent powers are vested in the executive to be exercised either without reference to the ministry or in opposition to its advice, these can only be exercised subject to the control of the British Parliament, i.e. of His Majesty's Secretary of State. Thus, the Governor-General and the Governors are constitutionally responsible for the exercise of their special powers or when acting in their discretion. Whenever the Governor-General and the Governors exercise powers in their discretion, i.e. without reference to their ministers, or in the exercise of their individual judgement, i.e. when they act in opposition to the advice of their ministers, they are subject to the powers of supervision and control by the Secretary of State. These powers have been specifically set forth in the various provisions of the Act. They extend to a very large number of subjects in the administrative and in the

legislative sphere. He will recruit for certain services in the Federation and in the Provinces, and will regulate their conditions of service.[1] In matters of finance, the control of the Secretary of State is restricted to the non-votable heads of expenditure in the central and provincial budgets and such other sums of money as may be required by the Governor-General and the Governors in discharge of their special responsibilities. These cover over 80 per cent of the federal revenues and 50 per cent of the provincial revenues. The coinage and currency of the Federation and the Reserve Bank of India are also subject to his control. The powers of the Secretary of State in Council to borrow on the security of the revenues of India will cease, but during the period of transition, i.e. the period which elapses between the commencement of Part III of the Act and the inauguration of the Federation, the Secretary of State is authorized to contract loans on behalf of the Governor-General in Council, in the United Kingdom, with the sanction of Parliament.[2] Even under the Act, the Secretary of State possesses considerable powers in relation to the affairs of India.

The Secretary of State has been empowered to appoint not less than three and not more than six persons for the purpose of advising him, at least one half of whom for the time being holding office as advisers must have held office for ten years under the Crown in India. It will be the duty of the persons so appointed to advise the Secretary of State on any matter relating to India on which he may seek their advice. Except as otherwise provided in this Act, it is within the discretion of the Secretary of State whether he consults his advisers either collectively or individually or not at all. Even when he does consult them, he is not bound to act on their advice save as otherwise provided.[3] So long as he remains the authority charged with the control of any members of the Public Services in India, he must lay before his advisers, and obtain the concurrence of a majority of them to, the draft of any rules which he proposes to make under the Act for the purpose of regulating the conditions of service, and any order which he proposes to make upon an appeal to him from any member of the Service, which he controls. This secures to the Services the safeguards which they at present enjoy through the Council of India.

The expenses of the India Office establishment have hitherto been a charge on the revenues of India, but an annual grant in aid of £150,000 is made by the Treasury. But under the new Act, the expenses of the India Office will be included in the Civil Service estimates of the United Kingdom, but Indian revenues would contribute a grant in aid, in respect of the agency functions which the Secretary of State and his department will continue to act on behalf of the Governments in India. Suitable provisions have been made in the Act for compensating those members of the staff of the India Office who may be prejudicially affected by the changes brought about by the Act.[4]

Part XI comes into force from 1 April, 1937.

Advisers to Secretary of State

278.—(1) There shall be a body of persons appointed by the Secretary of State, not being less than three nor more than six in number, as the Secretary of State may

[1] See Part X, Chapter II.
[2] See ss. 161 and 315.
[3] See ss. 261 and 278 (6).
[4] See s. 282.

from time to time determine, whose duty it shall be to advise the Secretary of State on any matter relating to India on which he may desire their advice.

(2) One half at least of the persons for the time being holding office under this section as advisers of the Secretary of State shall be persons who have held office for at least ten years under the Crown in India and have not last ceased to perform in India official duties under the Crown more than two years before the date of their respective appointments as advisers under this section.

(3) Any person appointed as an adviser to the Secretary of State shall hold office for a term of five years and shall not be eligible for reappointment:

Provided that—

(*a*) any person so appointed may by writing under his hand resign his office to the Secretary of State;

(*b*) the Secretary of State may, if he is satisfied that any person so appointed has by reason of infirmity of mind or body become unfit to continue to hold his office, by order remove him from his office.

(4) A person for the time being holding office as adviser to the Secretary of State shall not be capable of sitting or voting in either House of Parliament.

(5) There shall be paid out of moneys provided by Parliament to each of the advisers of the Secretary of State a salary of thirteen hundred and fifty pounds a year, and also to any of them who at the date of his appointment was domiciled in India a subsistence allowance of six hundred pounds a year.

(6) Except as otherwise expressly provided in this Act, it shall be in the discretion of the Secretary of State whether or not he consults with his advisers on any matter, and, if so, whether he consults with them collectively or with one or more of them individually, and whether or not he acts in accordance with any advice given to him by them.

(7) Any provision of this Act which requires that the Secretary of State shall obtain the concurrence of his advisers shall be deemed to be satisfied if at a meeting of his advisers he obtains the concurrence of at least one half of those present at the meeting, or if such notice and opportunity for objection as may be prescribed has been given to those advisers and none of them has required that a meeting shall be held for discussion of the matter.

In this subsection 'prescribed' means prescribed by rules of business made by the Secretary of State after obtaining at a meeting of his advisers the concurrence of at least one-half of those present at the meeting.

(8) The Council of India as existing immediately before the commencement of Part III of this Act shall be dissolved.

(9) Notwithstanding anything in the foregoing provisions of this section, a person who immediately before the commencement of Part III of this Act was a member of the Council of India may be appointed under this section as an adviser to the Secretary of State to hold office as such for such period less than five years as the Secretary of State may think fit.

Existing accounts of Secretary of State in Council with Bank of England

279.—(1) All stock or money standing to the credit of the Secretary of State in Council in the books of the Bank of England at the commencement of Part III of this Act, shall, as from that date, be transferred to the credit of the Secretary of State, and any order or instrument with respect to that stock or money executed by the Secretary of State or by such person as may be authorised in writing by the Secretary of State for the purpose, either generally or specially, shall be a sufficient authority and discharge to the Bank in respect of anything done by the Bank in accordance therewith.

(2) Any directions, authority or power of attorney given or executed by or on behalf of the Secretary of State in Council and in force at the commencement of Part III of this Act shall continue in force until countermanded or revoked by the Secretary of State.

Organisation and expenses of India Office

280.—(1) As from the commencement of Part III of this Act the salary of the Secretary of State and the expenses of his department, including the salaries and remuneration of the staff thereof, shall be paid out of moneys provided by Parliament.

(2) Subject to the provisions of the next succeeding section with respect to the transfer of certain existing officers and servants, the Secretary of State may appoint such officers and servants as he, subject to the consent of the Treasury as to numbers, may think fit and there shall be paid to persons so appointed such salaries or remuneration as the Treasury may from time to time determine.

(3) There shall be charged on and paid out of the revenues of the Federation into the Exchequer such periodi-

cal or other sums as may from time to time be agreed between the Governor-General and the Treasury in respect of so much of the expenses of the department of the Secretary of State as is attributable to the performance on behalf of the Federation of such functions as it may be agreed between the Secretary of State and the Governor-General that that department should so perform.

Transfer of existing personnel

281.—(1) All persons who immediately before the commencement of Part III of this Act were officers or servants on the permanent establishment of the Secretary of State in Council shall on that date be transferred to the department of the Secretary of State and shall be deemed to be permanent Civil Servants of the State.

(2) Subject as hereinafter provided, the provisions of the Superannuation Acts, 1834 to 1935, and of any orders, rules and regulations made thereunder shall apply in relation to a person so transferred as aforesaid as they apply in relation to a person entering the Civil Service with a certificate from the Civil Service Commissioners, and for the purposes of those Acts, orders, rules and regulations his service shall be reckoned as if service on the permanent establishment of, and employment by, the Secretary of State in Council had at all times been service or employment in a public department the expenses whereof were wholly defrayed out of moneys provided by Parliament:

Provided that neither the Superannuation Act, 1909, nor section four of the Superannuation Act, 1935 shall apply in relation to any person so transferred unless that Act, or, as the case may be, that section (as applicable to persons on the permanent establishment of the Secretary of State in Council) would have applied in relation to him if this Act had not been passed.

(3) His Majesty may by Order in Council direct that in their application to any person so transferred the said Acts, orders, rules and regulations shall have effect subject to any such modifications as may appear to His Majesty to be necessary for securing that the case of any such person shall not be dealt with in any manner less favourable to him than it would have been dealt with if this Act had not been passed and he had continued to serve on the establishment of the Secretary of State in Council.

(4) All persons who not being on the permanent establishment of the Secretary of State in Council, were immediately before the commencement of Part III of this Act officers or servants employed in the United Kingdom

by the Secretary of State in Council shall on that date be transferred to the department of the Secretary of State and, for the purposes of the Superannuation Acts, 1834 to 1935, and the orders, rules and regulations made thereunder, employment by the Secretary of State in Council shall be treated as if it had been employment by the Secretary of State.

(5) If the conditions of service of any person to whom the last preceding subsection applies included a condition as to eligibility for a retiring allowance in consideration of meritorious service, the Treasury may, if they think fit, grant to him such an allowance on his retirement.

(6) Notwithstanding anything in the Pensions Commutation Acts, 1877 to 1882, it shall be lawful for the Treasury to commute for a capital sum so much of any superannuation, compensation or retiring allowance as is payable out of moneys provided by Parliament to a person so transferred as aforesaid and for the Secretary of State so to commute so much of any such allowance as is payable to such a person out of the revenues of the Federation.

Any such commutation shall be made upon such conditions as His Majesty in Council may direct, not being more favourable than the conditions which would have applied to the person in question if he had retired from the establishment of the Secretary of State in Council.

See the Government of India (India Office Pensions) Order, 1936. Commutation of superannuation allowances, compensation allowances and retiring allowances under Cl. (6) of the section are regulated by paragraph 5 of the Order.

Contributions from revenues of Federation

282.—(1) So much of any superannuation allowances, compensation allowances, retiring allowances, additional allowances or gratuities which may become payable to or in respect of officers and servants transferred by the last preceding section to the department of the Secretary of State as His Majesty in Council may determine to represent the proportion of such allowances or gratuities attributable to service before the date of transfer shall be paid out of the revenues of the Federation :

Provided that account shall not be taken of any service before the date of transfer in respect of which such an allowance or gratuity payable out of moneys provided by Parliament might, if this Act had not been passed, have been awarded under the Superannuation Acts, 1834 to 1935.

(2) If any officer or servant so transferred to the department of the Secretary of State, or any person who, having been previously on the establishment of the Secretary of State in Council, was immediately before the commencement of Part III of this Act a member of the staff of the High Commissioner for India, or any person who immediately before the commencement of Part III of this Act was the Auditor of the Accounts of the Secretary of State in Council or a member of his staff, loses his employment by reason of the abolition of his office or post, or by reason of any reorganisation of the department or of his office, where such abolition or reorganisation results in the opinion of the Secretary of State from the operation of this Act or the Government of Burma Act, 1935, the Secretary of State shall award to that officer or servant out of the revenues of the Federation such compensation as he may think just and equitable in augmentation of any allowance or gratuity for which that officer or servant may be otherwise eligible.

(3) Any payments directed by this section to be made out of the revenues of the Federation shall be charged upon those revenues.

For provision for the payment out of the revenues of the Federation of allowances under Cl. (1) of this section, see the Government of India (India Office Pensions) Order, 1936.

Liability for pensions in respect of service before commencement of Part III

283.—(1) The liability for payment of any superannuation allowances, compensation allowances, retiring allowances, additional allowances and gratuities which immediately before the commencement of Part III of this Act were payable to or in respect of persons in respect of service on the establishment of the Secretary of State in Council, or in respect of service as Auditor of the Accounts of the Secretary of State in Council, or in respect of service as a member of that Auditor's staff, or partly in respect of service on the establishment of the Secretary of State in Council or as a member of that Auditor's staff and partly in respect of service as a member of the staff of the High Commissioner for India shall be a liability of the Government of the Federation, and those allowances and gratuities shall be charged upon the revenues of the Federation.

(2) The provisions of subsection (1) of this section shall also apply to so much of any superannuation allowances, compensation allowances, retiring allowances, additional allowances, and gratuities awarded after the commencement of Part III of this Act to persons not transferred by the

last but one preceding section as is attributable to such service before the commencement of Part III of this Act as is mentioned in the said subsection (1).

Persons who immediately before the commencement of Part III of this Act, were members of the staff of the Auditor of the Accounts of the Secretary of State in Council, are to become members of the staff of the Auditor of Indian Home Accounts. See ss. 251 and 252.

Provision as to certain India Office provident funds

284. Any sums which, if this Act had not been passed, would have been payable, whether as of right or not, by the Secretary of State in Council out of the revenues of India to or in respect of a person who was a subscriber to the Regular Widows' Fund, the Elders Widows' Fund, or the India Office Provident Fund, shall be paid out of the revenues of the Federation and charged on those revenues.

PART XII

MISCELLANEOUS AND GENERAL

PART XII

MISCELLANEOUS AND GENERAL

The Crown and the Indian States

285. Subject in the case of a Federated State to the provisions of the Instrument of Accession of that State, nothing in this Act affects the rights and obligations of the Crown in relation to any Indian State. Saving for rights and obligations of the Crown in its relations with Indian States

The new Act can only affect the Indian States who have joined the Federation, to the extent of the provisions of the Instrument of Accession and no further. Apart from the matters which the Ruler accepts in the Instrument as matters in respect of which the Federal Legislature may make laws for his State with the limitations inserted therein, the Ruler is not touched by the Act. Nor does the Act in any way affect the relation between the States and the Crown as the Paramount Power. See notes to ss. 2, 5 and 6 above, and Introduction to Part II, Chapter I and to Part II, Chapter II under PARAMOUNTCY.

286.—(1) If His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States requests the assistance of armed forces for the due discharge of those functions, it shall be the duty of the Governor-General in the exercise of the executive authority of the Federation to cause the necessary forces to be employed accordingly, but the net additional expense, if any, incurred in connection with those forces by reason of that employment shall be deemed to be expenses of His Majesty incurred in discharging the said functions of the Crown. Use of His Majesty's forces in connection with discharge of the functions of the Crown in its relations with Indian States

(2) In discharging his functions under this section the Governor-General shall act in his discretion.

The Viceroy to preserve peace and order in an Indian State may ask for armed forces from the Federal Government who shall give the help as demanded. The expenses for such military assistance will be regarded as expenses of His Majesty for the exercise of the functions of the Crown in its relation with the States. These expenses are charged on the revenues of the Federation,[1] and are payable on requisition made by the Viceroy.[2]

[1] See s. 33(3) (*f*).

[2] See s. 145.

Arrangements for Governors and Provincial staff to assist in discharging functions of Political Department

287. Arrangements may be made between His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States and the Governor of any Province for the discharge by the Governor and officers serving in connection with the affairs of the Province of powers and duties in connection with the exercise of the said functions of the Crown.

Under s. 123, the Governor-General may direct the Governor of a Province to discharge as his agent certain functions relating to tribal areas, defence, external affairs and ecclesiastical affairs. Under this section, the Viceroy may arrange for the discharge by a Governor and officers in the Province of certain functions of the Crown in its relation to the States. Under s. 2(1) Prov., powers relating to the exercise of the functions of the Crown in its relations with the States shall, if not exercised by His Majesty, be exercised only by the Viceroy or persons acting under his authority. The Governor and officers will be such persons acting under the authority of the Viceroy. The expenses for administering these delegated functions will be included in the expenses of His Majesty incurred in discharging these functions. These expenses are charged on the Federal revenues,[1] and are to be paid to His Majesty every year.[2]

Aden

288.—(1) On such date as His Majesty may by Order in Council appoint (in this section referred to as 'the appointed day') the then existing Chief Commissioner's Province of Aden (in this section referred to as 'Aden') shall cease to be a part of British India.

(2) At any time after the passing of this Act it shall be lawful for His Majesty in Council to make such provision as he deems proper for the government of Aden after the appointed day, and any such Order in Council may delegate to any person or persons within Aden, power to make laws for the peace, order and good government of Aden, without prejudice to the power of His Majesty in Council, notwithstanding such delegation, from time to time to make laws for any of the purposes aforesaid.

(3) An Order made by His Majesty in Council by virtue of the preceding subsection may, without prejudice to the generality of the words of that subsection, contain provisions with respect to—

(a) the continuing validity of all Acts, orders, ordinances and regulations in force in Aden immediately before the appointed day;

(b) the continuing validity of lawful acts done by any authority in Aden before the appointed day;

[1] See s. 33(3)(f). [2] See s. 145.

(c) the validity and continuance of proceedings commenced before the appointed day in any Court of Justice in, or having jurisdiction in, Aden; and

(d) the enforcement by or against the Government of Aden of claims which, if this Act had not been passed, might have been enforced by or against the Secretary of State in Council in connection with the administration of Aden.

(4) If any such Order is made, it shall confer appellate jurisdiction from courts in Aden upon such court in India as may be specified in the Order, and it shall be the duty of any court in India upon which jurisdiction is so conferred to exercise that jurisdiction, and such contribution, if any, as His Majesty in Council may determine shall be paid out of the revenues of Aden towards the expenses of that court.

The Order shall also make provision specifying the cases in which an appeal from that court in India may be brought to His Majesty in Council.

(5) Any property which immediately before the separation of Aden from India was vested in His Majesty for the purposes of the Government of India and either was then situate in Aden, or, by virtue of any delegation from the Secretary of State in Council or otherwise, was then in the possession, or under the control of, or held on account of, the Local Government of Aden, shall, as from the said separation, vest in His Majesty for the purposes of the Government of Aden, and any contract made or liability incurred by or on behalf of the Secretary of State in Council before the said separation solely for a purpose which will after the separation be a purpose of the Government of Aden shall, as from the separation, have effect as if it had been made or incurred by or on behalf of the Government of Aden.

The settlement of Aden which comprises the town of Aden itself and certain adjacent districts, was hitherto administered by the Government of India as a Chief Commissioner's Province. Responsibility for the hinterland of Aden which is not British territory, has since 1917 rested with His Majesty's Government who have also since the same date been responsible for the military and the political affairs of the settlement. Arrangements were made in 1926 under which an annual contribution, subject to a maximum of £150,000, was made from Indian revenues for military and political expenditure of the settlement and the protectorate. The population of the settlement is predominantly Arab, the Indian

population which is however of great commercial importance, numbering only about one-seventh of the whole.

This section provides that Aden is to cease to be part of British India on such date as His Majesty may by Order in Council appoint. The Order will provide for the future Government of Aden and power is reserved to His Majesty under subsection (2) to make laws for the peace, order and government of Aden.

The Order in Council relating to Aden, which has now been made, provides for its separation from India on 1 April 1937 and prescribes its constitution. It covers only what is now the settlement area of seventy-five square miles, and converts this into a Crown Colony under the normal regime appropriate thereto. The much larger Protectorate Area is now, and will remain as before, under the direct supervision of the Colonial Office. The Order provides that the new Colony shall have a Governor, and it is accompanied by the draft of his Instrument of Instructions. He will be assisted by an Executive Council whose composition is not specified. He will legislate by regulations subject to the usual right of the Crown to disallow his laws or supplement them by an Order in Council.

The Order provides for the safeguarding of Indian interests in the Colony. India is automatically relieved by implication of the annual contribution of about Rs.20 lakhs which she has hitherto had to pay to Aden. The right of civil and criminal appeal from the Supreme Court of Aden to the High Court of Bombay is conferred on all inhabitants of the Colony without discrimination and death sentence passed by the Supreme Court must be confirmed by the Bombay High Court. No racial discrimination of any kind is permitted in any circumstances whatsoever. An executive instruction will provide for the entry of British Indians into the Protectorate under the same terms as those accorded to other British subjects. The Governor may not impose duties or additional taxation without the Crown's approval, and Aden will remain a free Port so long as conditions permit. Executive instructions will cover the questions of the employment of Indian personnel in the local services, and it is understood that for the present it is intended that a number of men will be borrowed from the Indian services. The present level of the administration is to be maintained.

What was the District and Sessions Court has become the Supreme Court of the Colony as from 1 April 1937. There is appeal to the Bombay High Court involving property or some civil right to the value of Rs.5,000 or upwards, and in criminal cases as under the provisions of the Indian Code of Criminal Procedure. No appeal lies where the sentence does not exceed six months' imprisonment or a fine of Rs.500, or both such imprisonment and fine. All death sentences are subject to confirmation by the High Court. In specified civil cases there may be further appeal to the Privy Council. See the Aden Colony Order, 1936. The appointed day was the first day of April, 1937. The territory hitherto known as the Chief Commissioner's Province of Aden is known from that date as the Colony of Aden. His Majesty will by Sign Manual and Signet appoint a Governor and Commander-in-Chief over the Colony. The Governor and Commander-in-Chief may make laws for the peace, order and good government of the Colony, but His Majesty may disallow any such law, and reserves the power to make laws for the peace, order and good government of the Colony.

New Provinces and alterations of boundaries of Provinces

289.—(1) As from such date as His Majesty may by Order in Council appoint— Creation of new Provinces of Sind and Orissa

(*a*) Sind shall be separated from the Presidency of Bombay and shall form a Governor's Province to be known as the Province of Sind;

(*b*) Orissa and such other areas in the Province of Bihar and Orissa as may be specified in the Order of His Majesty shall be separated from that Province, and such areas as may be specified in the said Order shall be separated from the Presidency of Madras and the Central Provinces respectively, and Orissa and the other areas so separated shall together form a Governor's Province to be known as the Province of Orissa; and

(*c*) the Province formerly known as Bihar and Orissa shall be known as the Province of Bihar.

(2) An Order in Council made under this section shall define the boundaries of the Provinces of Sind and Orissa and may contain—

(*a*) such provisions for their government and administration during the period before Part III of this Act comes into operation;

(*b*) such provisions for varying during the said period the composition of the Local Legislature of any Presidency or Province the boundaries of which are altered under this section;

(*c*) such provisions with respect to the laws which, subject to amendment or repeal by the Provincial or, as the case may be, the Federal Legislature, are to be in force in, or in any part of, Sind or Orissa respectively;

(*d*) in the case of Orissa, such provisions with respect to the jurisdiction therein of any court theretofore exercising the jurisdiction of a High Court, either generally or for any particular purpose in any area to be included in the Province;

(*e*) such provisions with respect to apportionments and adjustments of and in respect of assets and liabilities; and

(*f*) such supplemental, incidental and consequential provisions,

as His Majesty may deem necessary or proper.

(3) Subject to the provisions of any such Order as aforesaid, the Governor-General in Council may, until the date on which Part III of this Act comes into operation, exercise in relation to the Provinces of Sind and Orissa and any Presidency or Province the boundaries of which are altered under this section any powers which he might have exercised if the said new Provinces had been constituted, or those boundaries had been altered, under the provisions in that behalf contained in the Government of India Act.

(4) In this Act the expression 'the Legislative Council of the Province' when used in relation to a date before the commencement of Part III of this Act shall in the case of Sind and Orissa be deemed to refer to the Legislative Councils of Bombay and of Bihar or Bihar and Orissa respectively.

The two new Provinces of Orissa and Sind have already been created by Order in Council under the provisions of this section, as from 1 April 1936.

See notes under s. 46 above.

Sind

Sind has been separated from Bombay and constituted as a Governor's Province from 1 April 1936 by the Government of India (Constitution of Sind) Order, 1936. It will be from that date till the commencement of Part III of this Act (the transitional period), governed by the Governor who shall have no Executive Council. But there will be an Advisory Council consisting of not more than twenty-five members nominated by the Governor, of whom not more than three are to be officials. The Budget will be laid by him before the Advisory Council for discussion only and will not be voted upon.

Apportionment of assets and liabilities between Sind and the Presidency of Bombay is provided for by Rule 20 and the Second Schedule to the Order.

After the commencement of Part III of this Act, the government will be that as in a Governor's Province.

Orissa

Orissa, consisting of certain parts of the Province of Bihar and Orissa, the Presidency of Madras and the Central Provinces, has been constituted as a Governor's Province from 1 April 1936 by the Government of India (Constitution of Orissa) Order, 1936. Its constitution is similar to that of Sind. The Advisory Council is to consist of not more than twenty members to be nominated by the Governor, of whom not more than three are to be officials. Apportionment of assets and liabilities between Orissa and the Provinces from which areas are separated by the Order is provided for by Rule 22 and the Third Schedule to the Order.

The areas transferred to Orissa from the Central Provinces and from the Vizagapatam Agency in the Presidency of Madras have been made Partially Excluded Areas by the Government of India (Excluded and Partially Excluded Areas) Order, 1936.

290.—(1) Subject to the provisions of this section, His Majesty may by Order in Council— Creation of new Provinces and alterations of boundaries of Provinces

(*a*) create a new Province ;
(*b*) increase the area of any Province ;
(*c*) diminish the area of any Province ;
(*d*) alter the boundaries of any Province :

Provided that, before the draft of any such Order is laid before Parliament, the Secretary of State shall take such steps as His Majesty may direct for ascertaining the views of the Federal Government and the Chambers of the Federal Legislature and the views of the Government and the Chamber or Chambers of the Legislature of any Province which will be affected by the Order, both with respect to the proposal to make the Order and with respect to the provisions to be inserted therein.

(2) An Order made under this section may contain such provisions for varying the representation in the Federal Legislature of any Governor's Province the boundaries of which are altered by the Order and for varying the composition of the Legislature of any such Province, such provisions with respect to apportionments and adjustments of and in respect of assets and liabilities, and such other supplemental, incidental and consequential provisions as His Majesty may deem necessary or proper :

Provided that, no such Order shall vary the total membership of either Chamber of the Federal Legislature.

(3) In this section the expression 'Province' means either a Governor's Province or a Chief Commissioner's Province.

Under s. 60 of the old Act, the Governor-General in Council may by notification declare, appoint, or alter the boundaries of any Province and distribute the territories of British India among the several Provinces.[1] The power to create new Provinces is new. Under this section, power is reserved to the Crown to alter, by Order in Council, the areas or boundaries of the existing Provinces or to create new Provinces.

It is, however, added in the proviso that before the draft of any such Order is laid before the Parliament, the Secretary of State is to take such steps as His Majesty may direct for ascertaining the views of the Federal Legislature and the views of the Government and the Chamber

[1] See J.C.R. 62 and 63.

or the Chambers of the Legislatures of the Province which will be affected by the Order. This procedure is to be adopted both for the proposal to make the Order and for the provisions to be inserted in it.

Franchise

Power of His Majesty to make provision with respect to franchises and elections

291. In so far as provision with respect to the matters hereinafter mentioned is not made by this Act, His Majesty in Council may from time to time make provision with respect to those matters or any of them, that is to say—

(*a*) the delimitation of territorial constituencies for the purpose of elections under this Act;

(*b*) the qualifications entitling persons to vote in territorial or other constituencies at such elections, and the preparation of electoral rolls;

(*c*) the qualifications for being elected at such elections as a member of a legislative body;

(*d*) the filling of casual vacancies in any such body;

(*e*) the conduct of elections under this Act and the methods of voting thereat;

(*f*) the expenses of candidates at such elections;

(*g*) corrupt practices and other offences at or in connection with such elections;

(*h*) the decision of doubts and disputes arising out of, or in connection with, such elections;

(*i*) matters ancillary to any such matter as aforesaid.

Under the provisions of this section, some Orders in Council have been passed with respect to the following matters:

1. The Government of India (Scheduled Castes) Order, 1936, defining for the purposes of the First, Fifth and Sixth Schedules of the Act, the castes, races or tribes who are to be deemed to be Scheduled Castes.

2. The Government of India (Provincial Legislative Assemblies) Order, 1936, laying down for the Provincial Legislative Assemblies rules about territorial and special constituencies, preparation of electoral rolls, special provisions for the Scheduled Castes, Women's seats, Anglo-Indian seats, European seats, Landholders' seats and other seats. By this Order, certain minor amendments have been made in the Fifth and Sixth Schedules.

3. The Government of India (Provincial Legislative Councils) Order, 1936, laying down for the Provincial Legislative Councils rules regulating delimitation of territorial constituencies, qualifications of candidates, dates of nominations and elections, etc.

4. The Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, making provisions about election agents, and expenses, decision of doubts and disputes about elections and disqualifications for corrupt practices.

Other Orders in Council may be passed from time to time to deal further with the matters mentioned in this section.

Under paragraph 20 of the Fifth Schedule, the Governor, in his individual judgement, may make rules for carrying into effect the provisions of the Fifth and the Sixth Schedules, in the absence of provisions made by this Act or Order in Council or by the Provincial Legislature.

Corrupt practices and election petitions Corrupt practices and election petitions have been dealt with by the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order amended by paragraph 4 of the Government of India (Provincial Legislatures) (Miscellaneous Provisions) Order, 1936; and by Rules made by the Governor under powers conferred by paragraph 20 of the Fifth Schedule. See s. 69 for disqualifications for membership.

Provisions as to certain legal matters

292. Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority. Existing law of India to continue in force

The law existing before Part III of the Act comes into force shall continue to prevail unless altered by the Legislature or any other competent authority. But Orders in Council may be made modifying such law, as provided in s. 243, so as to bring it into accord with the provisions of this Act.

Laws in force: Reference may here be made to the Indian legal system. The law administered by the Indian courts consists of:

(1) Acts of Parliament extending to India and rules and Orders made thereunder;

(2) Acts of the Governor-General in Council, of the Indian Legislature and of the Governor-General and rules and orders made thereunder; Ordinances made by the Governor-General and regulations for special areas made by the Governor-General in Council;

(3) Acts passed by local legislatures of the various Provinces and rules and regulations made thereunder;

(4) certain regulations made by the Government of Bombay, Madras and Bengal before 1833 and the Governor-General in Executive Council for the Punjab up to 1861.

These measures of codification are of general application and cannot be superseded by the private law of any particular community. But they leave untouched most of the essentials of private law. The courts give effect to the Hindu and Mahommedan law and the customary law of particular castes or sects such as Jains or Sikhs in causes between the members of a community relating to inheritance and succession, and so far as it has not been superseded by legislation or is contrary to justice, equity or good conscience. Hindus retain their family law, regulating marriage, adoption, the joint family, partition and inheritance.

Mahommedans follow their own law of marriage, of testamentary and intestate succession and of religious endowments. The courts give effect to the different systems of Hindu and Mahommedan law that exist in different parts of the country. Few legislative changes have been made in these two systems. The Age of Consent Act (Act XIX of 1929) forbids consummation of marriage before the ages of eighteen for the boy and fourteen for the girl. By the Indian Majority Act, 1875, infants are protected against the earlier attainment of majority and legal capacity. Hindu and Mahommedan Law, save as aforesaid, has been considerably developed by judge-made law. The Parsee community has special rules of succession which have been codified in the Succession Act of 1925, which has also been accepted by the Jews of India in general. The chief authority for Buddhist law which prevails in Burma is the Manugye Dhammathat promulgated as authoritative by King Alaungpaya in 1756.

Special legislation for marriage (the Indian Christian Marriage Act, 1872) has been made for the Indian Christians, while the special Marriage Act, 1872, as extended by Act XXX of 1923, applies to non-Christians, Hindus, Buddhists, Sikhs and Jains. All these measures allow divorce, but the courts recognize and give effect to divorces carried out under the personal law of non-Christians.[1]

The law of torts is practically English Law, as laid down by the judges. By paragraph 9 of the Government of India (Commencement and Transitory Provisions) Order, 1936, Acts of the Indian Legislature as also Regulations and Ordinances under ss. 71 and 72 of the old Act, passed before the commencement of Part III of the Act may validly come into force at, or at any time after, the commencement of Part III, and will lapse after 12 months.

Adaptation of existing Indian laws, etc.

293. His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the Order, any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act and, in particular, into accord with the provisions thereof which reconstitute under different names governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the Provinces :

Provided that no such law as aforesaid shall be made applicable to any Federated State by an Order in Council made under this section.

In this section the expression ' law ' does not include an Act of Parliament, but includes any ordinance, order,

[1] *Khambatta* v. *Khambatta* (1935) 59 Bom. 279.

byelaw, rule or regulation having in British India the force of law.

S. 292 provides for the continuance of existing laws in force at the commencement of Part III of the Act, subject to amendments by competent authority. Pending such amendments, His Majesty may by Order in Council prescribe that from a certain date the existing Indian law shall be in force subject to such adaptations and modifications as appear necessary to him. But such Order in Council shall not apply to any Federated State.

See the Government of India (Adaptation of Indian Laws) Order, 1937. The Indian Laws mentioned in the Schedule to the Order, until repealed or amended, are to apply as modified in the Schedule. For the expression 'Local Government', the expression 'Provincial Government' has been substituted. This order is in force from 1 April, 1937.

See the India and Burma (Burma Monetary Arrangements) Order, 1937.

294.—(1) Neither the executive authority of the Federation nor the legislative power of the Federal Legislature shall extend to any area in a Federated State which His Majesty in signifying his acceptance of the Instrument of Accession of that State may declare to be an area theretofore administered by or on behalf of His Majesty to which it is expedient that the provisions of this subsection should apply, and references in this Act to a Federated State shall not be construed as including references to any such area : Foreign jurisdiction

Provided that—

(*a*) a declaration shall not be made under this subsection with respect to any area unless, before the execution by the Ruler of the Instrument of Accession, notice has been given to him of His Majesty's intention to make that declaration ;

(*b*) if His Majesty with the assent of the Ruler of the State relinquishes his powers and jurisdiction in relation to any such area or any part of any such area, the foregoing provisions of this subsection shall cease to apply to that area or part, and the executive authority of the Federation and the legislative power of the Federal Legislature shall extend thereto in respect of such matters and subject to such limitations as may be specified in a supplementary Instrument of Accession for the State.

Nothing in this subsection applies to any area if it appears to His Majesty that jurisdiction to administer the area was granted to him solely in connection with a railway.

(2) Subject as aforesaid and to the following provisions of this section, if, after the accession of a State becomes effective, power or jurisdiction therein with respect to any matter is, by virtue of the Instrument of Accession of the State, exercisable, either generally or subject to limits, by the Federation, the Federal Legislature, the Federal Court, the Federal Railway Authority, or a Court or an authority exercising the power or jurisdiction by virtue of an Act of the Federal Legislature, or is, by virtue of an agreement made under Part VI of this Act in relation to the administration of a law of the Federal Legislature, exercisable, either generally or subject to limits, by the Ruler or his officers, then any power or jurisdiction formerly exercisable on His Majesty's behalf in that State, whether by virtue of the Foreign Jurisdiction Act, 1890, or otherwise, shall not be exercisable in that State with respect to that matter or, as the case may be, with respect to that matter within those limits.

(3) So much of any law as by virtue of any power exercised by or on behalf of His Majesty to make laws in a State is in force in a Federated State immediately before the accession of the State becomes effective and might by virtue of the Instrument of Accession of the State be re-enacted for that State by the Federal Legislature, shall continue in force and be deemed for the purposes of this Act to be a Federal law so re-enacted:

Provided that any such law may be repealed or amended by Act of the Federal Legislature and unless continued in force by such an Act shall cease to have effect on the expiration of five years from the date when the accession of the State becomes effective.

(4) Subject as aforesaid, the powers and jurisdiction exercisable by or on behalf of His Majesty before the commencement of Part III of this Act in Indian States shall continue to be exercisable, and any Order in Council with respect to the said powers or jurisdiction made under the Foreign Jurisdiction Act, 1890, or otherwise, and all delegations, rules and orders made under any such Order, shall continue to be of full force and effect until the Order is amended or revoked by a subsequent Order:

Provided that nothing in this subsection shall be construed as prohibiting His Majesty from relinquishing any power or jurisdiction in any Indian State.

(5) An Order in Council made by virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, empowering any person to make rules and orders in respect of courts or administrative authorities acting for any territory shall not be invalid by reason only that it confers, or delegates powers to confer, on courts or administrative authorities power to sit or act outside the territory in respect of which they have jurisdiction or functions, or that it confers, or delegates power to confer, appellate jurisdiction or functions on courts or administrative authorities sitting or acting outside the territory.

(6) In the Foreign Jurisdiction Act, 1890, the expression 'a British Court in a foreign country' shall, in relation to any part of India outside British India, include any person duly exercising on behalf of His Majesty any jurisdiction, civil or criminal, original or appellate, whether by virtue of an Order in Council or not, and for the purposes of section nine of that Act the Federal Court shall, as respects appellate jurisdiction in cases tried by a British Court in a Federated State, be deemed to be a Court held in a British Possession or under the authority of His Majesty.

(7) Nothing in this Act shall be construed as limiting any right of His Majesty to determine by what courts British subjects and subjects of foreign countries shall be tried in respect of offences committed in Indian States.

(8) Nothing in this section affects the provisions of this Act with respect to Berar.

On federation, any authority of the Crown under the Foreign Jurisdiction Act, 1890 or otherwise shall become exercisable by the federal authorities including the Statutory Railway Authority, except in so far as is otherwise provided by any agreement made under Part VI of the Act for the administration of federal legislation by the Rulers.[1] The powers of the Crown in a State will remain unaffected in all other cases, without prejudice to its power to relinquish such authority, and the Order in Council of 1902 is reaffirmed as valid. It is also provided that an Order under the Act of 1890 may validly authorize judicial or administrative authorities to act in respect of territory, though situated outside the territory, and the appellate jurisdiction of British courts in the Indian States may validly be conferred on the Federal Court. Nothing in the Act can limit the power of the Crown to determine by what courts British subjects and subjects of foreign countries shall be tried in respect of offences committed in an Indian State. Questions of Paramountcy as between the Crown and the States do not come within the scope of the Federation at all, so the Act does not deal with Paramountcy. See Part II, Chapter I, Introduction under PARAMOUNTCY.

[1] See Cl. (2).

The powers of the Indian legislative, executive and judicial authorities with respect to things outside the territorial limits of British India, particularly in the territories in the Indian States and in the countries bordering on India are mainly derived from the following sources:

I. The Indian Legislature has been given powers under various Imperial Acts to make laws with extra-territorial operation on various subjects. For instance, under s. 99 of the present Act, which re-enacts similar provisions of the older Acts, the Federal Legislature has been empowered to make laws for all British subjects domiciled in India and regulations for the discipline of any naval, military and air force raised in British India, without and beyond, as well as within, the Indian territories under the dominion of His Majesty. So also s. 264 of the Merchant Shipping Act, 1894 [1] enacts that if the Legislature of a British possession—an expression including India—by any law apply or adapt to any British ships registered at, trading with, or being at, any port in that possession and to the owners and masters and crews of those ships, any provisions in Part II of that Act which they do not otherwise so apply, the law is to have effect throughout His Majesty's dominions and in all places where His Majesty has jurisdiction in the same manner as if it were enacted in the Merchant Shipping Act itself. In like manner, s. 368 of the Merchant Shipping Act enacts that the Governor-General of India in Council, may by any Act passed for the purpose, declare that all or any of the provisions of Part III of the Merchant Shipping Act, 1894 shall apply to the carriage and steerage of passengers upon any voyage from any specified part in British India to any other specified part whatsoever, and may make, for the purposes of Part III of the Act, other regulations; and the provisions of any such Indian Act while in force are to have effect without as well as within British India as if enacted by the Merchant Shipping Act itself.

II. Parliamentary legislation has given extra-territorial jurisdiction to courts in British India which could not have been conferred on them by Acts of Indian Legislature.[2] See the Slave Trade Act, 1876 [3] which enacts that if any person, being a subject of His Majesty, or of any Prince or State in Indian alliance with His Majesty, should on the high seas or in any part of Asia or Africa specified by Order in Council in that behalf commit any of certain offences relating to Slave Trade under the Penal Code, or abet the commission of any such offence, he will be dealt with as if the offence or abetment had been committed in any place within British India in which he may be or may be found.

III. The Governor-General in Council has in his executive capacity extra-territorial powers far wider than those which may be exercised by the Indian Legislature. As Ilbert observes in *The Government of India* [4]

> The Governor-General in Council is the representative in India of the British Crown, and as such can exercise under delegated authority the powers incidental to sovereignty with reference both to British India and to neighbouring territories subject to the restrictions imposed by Parliamentary legislation and to the control exercised by the Crown, through the Secretary of State for India.

Thus he can acquire and exercise within the territories of Indian States and of adjoining States which border on India, powers of legislation and

[1] 57 and 58 Vict., c. 60.

[2] See 12 and 13 Vict., c. 96; 23 and 24 Vict., c. 88; 53 and 54 Vict., c. 27.

[3] 39 and 40 Vict., c. 46

[4] 3rd ed., 1915, p. 417.

jurisdiction similar to those which are exercised by the Crown in foreign countries in accordance with the Foreign Jurisdiction Act and the Orders in Council under them, and extending to persons who are not subjects of the King. The existence of the extra-territorial powers exercisable by the Governor-General in Council is recognized by the Order in Council of 1902 made under the Foreign Jurisdiction Act, 1890. The Order of 1902 now regulates the exercise of foreign jurisdiction by the Governor-General in Council. The Order which is re-affirmed as valid in this section, is as follows:

1. The Order may be cited as the Indian (Foreign Jurisdiction) Order in Council, 1902.
2. The limits of this Order are the territories in India outside British India and any other territories which may be declared by His Majesty to be territories in which jurisdiction is exercised by or on behalf of His Majesty through the Governor-General of India in Council or some authority subordinate to him, *including the territorial waters of any* such jurisdiction.
3. The Governor-General of India in Council may, on His Majesty's behalf, exercise any power of jurisdiction which His Majesty or the Governor-General of India in Council for the time being has within the limits of this Order, and may delegate any such power or jurisdiction to any servant of the British Indian Government in such manner and to such extent, as the Governor-General in Council from time to time thinks fit.
4. The Governor-General in Council may make such rules and Orders as may seem expedient for carrying this Order into effect and in particular—
   (*a*) for determining the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force elsewhere, or otherwise;
   (*b*) for determining the persons who are to exercise jurisdiction either generally or in particular classes of cases and the powers to be exercised by them;
   (*c*) for determining the courts, authorities, judges and magistrates, by whom and for regulating the manner in which, any jurisdiction, auxiliary or incidental to or consequential on the jurisdiction exercised under this Order, is to be exercised in British India;
   (*d*) for regulating the amount, collection and application of fees.
5. All appointments, delegations, certificates, requisitions, rules, notifications, processes, orders and directions made or issued under or in pursuance of any enactment of the Indian Legislature regulating the exercise of foreign jurisdiction, are hereby confirmed and shall have effect as if made or issued under this Order.
6. The Interpretation Act, 1889, shall apply to the construction of this Order.

The Order is, as Ilbert says, wide enough to include every possible source of extra-territorial authority. The powers delegated are both

executive and legislative, and the local limits of the Order, within which, or with respect to which, jurisdiction and powers may be exercised under the Order are the territories outside, and adjacent to British India, which, of course, include the Indian States. The jurisdiction of the Governor-General in Council within the territories in the Indian States is exercised—

(i) over European British subjects in all cases;
(ii) over British Indian subjects in certain cases;
(iii) over all classes of persons, British or Foreign within certain areas.

It has been the practice of the Government of India not to allow State courts to exercise jurisdiction in the case of the European British subjects, but to require them either to be tried by the British courts, established in the Indian States or to be sent for trial before a court in British India. The Government of India does not claim similar jurisdiction over British Indian subjects when within Indian States but doubtless would assert jurisdiction over such persons in cases where it thought the assertion necessary. As, for international purposes, the territory of Indian States is in the same position as the territory of British India,[1] the jurisdiction is also exercisable over European foreigners in the Indian States. This section[2] affirms that the Crown possesses jurisdiction over foreign subjects in respect of offences committed in Indian States. Lastly, there are certain areas within which full jurisdiction has been ceded to the Government of India and within which jurisdiction is accordingly exercised by courts and officers of the Government of India over all classes of persons as if the territory were part of India such as the Berars, the Residencies and other stations in the occupation of political officers, and cantonments in the occupation of British troops. Jurisdiction has also been ceded over railway lands within the territories of States. The extra-territorial powers of the Governor-General are, according to Ilbert[3] the following:

1. The extra-territorial powers of the Governor-General of India are much wider than the extra-territorial powers of the Indian Legislature, and are not derived from, though they may be regulated or restricted by, English or Indian Acts.
2. Those powers are exercisable within the territories of all the Indian States. Whether they are exercisable within the territories of any State outside India is a question which depends on the arrangements in force with the Government of that State, and on the extent to which the powers of the Crown exercisable in pursuance of such arrangements have been delegated to the Governor-General.
3. The jurisdiction exercisable under those powers might be made to extend not only to British subjects and to subjects of the State within which the jurisdiction is exercised, but also to foreigners.
4. The classes of foreigners and cases to which jurisdiction actually applies depend on the agreement, if any, in force with respect to its exercise and, in the absence of express agreement, on usage and the circumstances of the case,

[1] See Introduction to Part II, Chapter I under RELATION BETWEEN PARAMOUNT POWERS AND THE STATE.

[2] See subsection (7).

[3] See p. 428.

and may be defined, restricted or extended accordingly by the instrument regulating the exercise of the jurisdiction.

Under s. 2 of the Act, all these powers and jurisdiction are now resumed by the Crown to be exercised in accordance with the various provisions of this section. The extra-territorial powers will be exercised as heretofore, subject to such modifications as have been rendered necessary by the constitutional changes. The provision for accession of the Indian States to the Federation necessarily restricts the exercise of these powers in the territories of those States which shall elect to be federated. The extra-territorial powers hitherto exercised by the Governor-General in India in Council partly devolve, as far as the Federated States are concerned, on the federal authorities to the extent covered by their Instrument of Accession. These powers shall be regulated by this Act, and shall not be exercisable under foreign jurisdiction. Otherwise, the powers of the Governor-General under foreign jurisdiction will be exercisable in the Federated States. Power has also been reserved to His Majesty, to exclude, at the time of the acceptance of the Instrument of Accession, areas in that State, from the executive and legislative authority of the Federation, and in such areas, the Governor-General will be free to exercise his extra-territorial powers. Save as referred to herein, the powers of the Governor-General under foreign jurisdiction remain unaltered. As regards the powers of the Federal Legislature to make laws with extra-territorial operation, see s. 99 and notes thereto.

See the Indian (Foreign Jurisdiction) Order, 1937, amending the Indian (Foreign Jurisdiction) Order, 1902. The powers conferred by the Order of 1902 on the Governor-General in Council connected with the exercise of the functions of the Crown in its relation with Indian States, devolve from the commencement of Part III of the Act, on His Majesty's representative.

Provisions as to death sentences

295.—(1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province:

Provided that nothing in this subsection affects any power of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a court martial.

(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment.

The prerogative of pardon reprieve and remission and commutation of sentence belongs to His Majesty.[1] The Governor-General under

[1] See notes to s. 2 under PREROGATIVE POWERS.

s. 2(1) (*b*) will exercise such prerogative powers of the Crown (not being powers inconsistent with the Act) as His Majesty may be pleased to delegate to him. Under the Indian Code of Criminal Procedure, the Governor in Council has the power of pardon, remission or commutation of sentence. In any sentence on a person, convicted in a Province, the only authority outside the Province who can interfere is the Governor-General who can suspend, remit or commute a sentence of death.

Courts of Appeal in revenue matters

296.—(1) No member of the Federal or a Provincial Legislature shall be a member of any tribunal in British India having jurisdiction to entertain appeals or revise decisions in revenue cases.

(2) If in any Province any such jurisdiction as aforesaid was, immediately before the commencement of Part III of this Act, vested in the Local Government, the Governor shall constitute a tribunal, consisting of such person or persons as he, exercising his individual judgment, may think fit, to exercise the same jurisdiction until other provision in that behalf is made by Act of the Provincial Legislature.

(3) There shall be paid to the members of any tribunal constituted under the last preceding subsection, such salaries and allowances as the Governor exercising his individual judgment may determine, and those salaries and allowances shall be charged on the revenues of the Province.

Under s. 226, the High Court has no original jurisdiction in revenue matters unless otherwise provided by legislation. If in any Province, any appellate or revisionary jurisdiction was vested in the local Government, before the Act came into force in the Provinces, the Governor is (until otherwise provided by a Provincial Act) to constitute a tribunal to hear appeals or revision matters in revenue cases. The salaries and allowances of the members of the tribunal are to be determined by the Governor in his individual judgement and are charged on the revenues of the Province.

Prohibition of certain restrictions on internal trade

297.—(1) No Provincial Legislature or Government shall—

(*a*) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description; or

(b) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manutured or produced in one locality and similar goods manufactured or produced in another locality.

(2) Any law passed in contravention of this section shall, to the extent of the contravention be invalid.

The section provides for the economic unity of India by prohibiting internal economic barriers. A Provincial Government will not be permitted fiscal developments which will obstruct or restrict the flow of internal or external trade. No Province can impose customs duties levied at its frontiers on goods entering the Province from other parts of India. The Federation alone can impose tariffs and other restrictions on trade. But the imposition by a provincial authority of the octroi and terminal taxes is not prohibited—as these taxes may be levied on all goods whether or not they are manufactured within the Province.

While Provinces are debarred by statute from taxing goods manufactured in the Indian States, no such obligation is placed on the latter, in regard to goods entering into the State from Provinces. The States possess the right to impose customs duties on their frontiers. States acceding to the Federation are not required to accept the principle of internal freedom for trade in India, although internal customs barriers are in principle inconsistent with the freedom of interchange in a fully developed federation. See J.C.R. 264.

Persons not to be subjected to disability by reason of race, religion, etc.

298.—(1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.

(2) Nothing in this section shall affect the operation of any law which—

(a) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class; or

(*b*) recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

(3) Nothing in this section shall be construed as derogating from the special responsibility of the Governor-General or of a Governor for the safeguarding of the legitimate interests of minorities.

Fundamental rights

See J.C.R. 366–73. This and the next succeeding sections contain what is commonly known as declaration of fundamental rights. The Act declares that no British subject, domiciled in India, shall be disabled from holding public office or from practising any trade, profession or calling by reason only of colour, race, religion, caste or place of birth, and further, that a person shall not be deprived of property except by authority of law and that, compulsory acquisition of land can only be made on payment of compensation. The Act also makes further declarations as to the rights of persons not to be disqualified by sex for holding certain offices [1] and as to the rights of British subjects domiciled in the United Kingdom.[2]

Constitutional lawyers are not agreed as to the necessity of incorporating these declarations of rights in a document. The statutory Commission made the following observations with regard to this subject:

> We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the War. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective.[3]

The authors of the Joint Select Committee in expressing agreement with these views stated in paragraph 366 of their Report as follows:

> A cynic might find plausible arguments in the history during the last ten years of more than one country, for asserting that the most effective method of ensuring the destruction of fundamental rights is to include a declaration of its existence in a constitutional instrument. But there are also strong practical arguments against the proposal, which may be put in the form of a dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restriction on the powers of the Legislature and to create a grave risk that a large number of laws may be declared invalid by the courts because inconsistent with one or other of the rights so declared. . . . There is this further objection that the States have made it abundantly clear that no declaration of fundamental rights is to apply in State territories; and it would be altogether anomalous if such a declaration had legal force in part only of the area of the Federation. There are, however, one or two legal principles which might, we think, be appropriately embodied in the constitution.

1 S. 275.

2 Part V, Chapter III.

3 Report, Vol. II, par. 36.

There are others, not strictly of a legal kind, to which perhaps His Majesty will think fit to make reference in any Proclamation which he may be pleased to issue in connection with the establishment of the new Order in India.

Sir P. S. Sivaswami Iyer, a constitutional writer of eminence, expresses the uselessness of these declarations in these terms :

In the final place it is hardly necessary, at this time of day, to think of conferring protection against the arbitrary acts of the executive Government. The rule of law is so firmly established in the system of English Jurisprudence by which we are governed, that the danger of encroachment by the executive authority on the rights of individual citizens, otherwise than under colour of law, hardly exists at the present moment. Secondly, the rights included in these declarations are not placed above the reach of the ordinary legislature, for, most of them are expressed in language which recognizes and permits interference by the legislature. Thirdly, the language in which the so-called rights are declared clearly show that they are not legally enforceable terms at all. They are expressed in far too loose and vague a manner to be regarded as a statement of legal rights. Most of the statements are expressed in a very crude form, without any of the qualifications and limitations which would be necessary to make them accurate legal propositions. . . . If these declarations are treated, as they should be, as devoid of legal contents, they are merely illusory safeguards of rights. If on the other hand, they are treated as having the force of law as not liable to change by the ordinary legislatures, they are sure to interfere with the working of the ordinary legislature and to hamper the passing of legislative measures which may be found to be called for in the interests of the safety of the State. . . . Measures like the suspension of the Habeas Corpus Act or the Defence of the Realm Act may be imperatively called for but the legislature will be powerless to put them through. When the Government of this country becomes responsible, we shall ourselves realize the wisdom of not crippling the efficiency of the legislature and preventing it from acting with vigour and promptitude on occasions of emergency. These are the reasons why the Declaration of Rights in a Constitution must be held to be unnecessary, unscientific, misleading and either legally ineffective or harmful.

The section will not affect the validity of any existing law, like the Punjab Land Alienation Act, which prohibits either absolutely or with exceptions, the sale or mortgage of agricultural land in any or to any person not belonging to some recognized class.

See notes to s. 117. See also Part X, Chapter V under RULE OF LAW.

299.—(1) No person shall be deprived of his property in British India save by authority of law. Compulsory acquisition of land, etc.

(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in,

or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.

(3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or, in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

(5) In this section 'land' includes immovable property of every kind and any rights in or over such property, and 'undertaking' includes part of an undertaking.

This section safeguards private property against expropriation. Legislation expropriating or authorizing the expropriation of the property of particular individuals will be lawful only if confined to expropriation for public purposes and if compensation is determined in accordance with the provisions of subsection (2). General legislation on the other hand, the effect of which would be to transfer to public ownership some particular class of property or to extinguish or modify the rights of individuals in it, will require the previous sanction of the Governor-General or Governor (as the case may be) to its introduction and in that event, he will be directed by the Instrument of Instruction to take into account as a relevant factor the nature of the provisions proposed for compensating those whose interests will be adversely affected by the legislation.[1] But the section does not restrict the powers of the Legislature in relation to taxation.

Protection for certain rights, privileges, and pensions

300.—(1) The executive authority of the Federation or of a Province shall not be exercised, save on an order of the Governor-General or Governor, as the case may be, in the exercise of his individual judgment, so as to derogate from any grant or confirmation of title of or to land, or of or to any right or privilege in respect of land or land revenue, being a grant or confirmation made before the first day of January, one thousand eight hundred and seventy, or made on or after that date for services rendered.

(2) No pension granted or customarily payable before the commencement of Part III of this Act by the Governor-

[1] See J.C.R. par. 369.

General in Council or any Local Government on political considerations or compassionate grounds shall be discontinued or reduced, otherwise than in accordance with any grant or order regulating the payment thereof, save on an order of the Governor-General in the exercise of his individual judgment or, as the case may be, of the Governor in the exercise of his individual judgment, and any sum required for the payment of any such pension shall be charged on the revenues of the Federation or, as the case may be, the Province.

(3) Nothing in this section affects any remedy for a breach of any condition on which a grant was made.

This section refers to grants of land or of tenure of land free of land revenue or subject to partial remissions of land revenue, held under various names (of which Taluk, Inam, Watan, Jagir and Muafi are examples) throughout British India by various individuals or classes of individuals. Some of these grants date from Moghul or Sikh times and have been confirmed by the British Government; others have been granted by the British Government for services rendered. The terms of these grants differ; older grants are perpetual, modern grants are mostly for three or even two generations. But whatever the terms, a grant of this kind is always held in virtue of a specific understanding given by or on the authority of, the British Government that, subject to some cases to the due observance by the grantee of specified conditions, the rights of himself and his successors will be respected either for all time or, as the case may be, for the duration of the grant. A well-known instance of such rights is to be found in those enjoyed by the present Talukdars of Oudh, who owe their origin to the grant to their predecessors of sanads by Lord Canning, the then Governor-General, conferring proprietory rights upon all those who engaged to pay the jumma, which might then or might from time to time subsequently, be fixed, subject to loyalty and good behaviour; and the rights thus conferred were declared to be permanent, hereditary, and transferable.[1] The holders of these 'vested interests' naturally felt apprehensive lest the grant of responsible government and the consequent handing over of matters connected with land revenue (which is included in the Provincial List in the Seventh Schedule) to the control of Ministers and Legislatures should result in a failure to respect the promises of the Government made to their predecessors. The Joint Committee in paragraph 371 of their Report recommended a provision in the Act requiring the previous sanction of the Governor-General or the Governor to any proposal altering or prejudicing the rights of the grantees. This section adopts the recommendation. But the section does not contemplate that every promise or undertaking made by the British Government in the past shall remain unaltered and unalterable for all time, if its modification can be justified in the light of changed circumstances. Likewise, subsection (2) affords similar protection to those who receive pension, or compassionate allowance from the Government on political and other considerations.

[1] See J.C.R. par. 370.

The Permanent Settlement

Still stronger is the case of Zamindars and others who are the successors in interests of those in whose favour the Permanent Settlement of Bengal, Bihar and Orissa and parts of the United Provinces and Madras was made in 1793.

Under the Bengal Permanent Settlement Regulation I of 1793, the Zamindars were declared proprietors of the areas over which their revenue collection extended, subject to the payment of land revenue and to the liability to have their lands sold for failure of payment. The assessment fixed on the land was declared to be unalterable for ever, and the British Government specifically undertook not to make any demand on the Zamindars or their heirs or successors, 'for augmentation of the public assessment in consequence of the improvement of their respective estates'. The Zamindars collected and paid to Government the revenue assessed on that land which was fixed at rates declared at the time to be intended to stand unaltered in perpetuity. The Joint Select Committee in their Report[1] observe:

> It is apparent that the position of Zamindars under the Permanent Settlement is very different from that of the individual holders of grants or privileges of the kind we have just described; for, while the privileges of the latter might, but for a protection such as we suggest, be swept away by a stroke of the pen with little or no injury to any but the holder of the vested interest himself, the alteration of the character of the land revenue settlement in Bengal, for instance, would involve directly or indirectly the interests of vast numbers of the population, in addition to those of the comparatively small number of Zamindars proper, and might indeed produce an economic revolution of a most far-reaching character. Consequently, no Ministry or Legislature in Bengal, could, in fact, embark upon, or at all events carry to a conclusion, legislative proposals which would have such results, unless they had behind them an overwhelming volume of public support. We do not dispute the fact that the declarations as to the permanence of the Settlement, contained in the Regulations under which it was enacted, could not have been departed from by the British Government so long as that Government was in effective control of land revenue. But we could not regard this fact as involving the conclusion that it must be placed beyond the legal competence of an Indian Ministry responsible to an Indian Legislature, which is to be charged *inter alia* with the duty of regulating the land revenue system of the Province, to alter the enactments embodying the Permanent Settlement, which enactments, despite the promises of permanence which they contain, are legally subject (like any other Indian enactment) to repeal or alteration. Nevertheless, we feel that the Permanent Settlement is not a matter for which, as the result of the introduction of Provincial Autonomy, His Majesty's Government can properly disclaim all responsibility. We recommend, therefore, that the Governor should be instructed to reserve for the signification of His Majesty's pleasure any Bill passed by the Legislature which would alter the character of the Permanent Settlement.

Agricultural income is exempt from income-tax. See notes to s. 138 under this head.

[1] Par. 372.

301. Section eighteen of the East India Company Act, 1780, and section twelve of the East India Act, 1797 (being obsolete enactments containing savings for native law and custom) are hereby repealed.

Repeal of s. 18 of 21 Geo. 3, c. 70, and s. 12 of 37 Geo. 3, c. 142

High Commissioner

302.—(1) There shall be a High Commissioner for India in the United Kingdom who shall be appointed, and whose salary and conditions of service shall be prescribed, by the Governor-General, exercising his individual judgment.

High Commissioner for India

(2) The High Commissioner shall perform on behalf of the Federation such functions in connection with the business of the Federation, and, in particular, in relation to the making of contracts as the Governor-General may from time to time direct.

(3) The High Commissioner may, with the approval of the Governor-General and on such terms as may be agreed, undertake to perform on behalf of a Province or Federated State, or on behalf of Burma, functions similar to those which he performs on behalf of the Federation.

See s. 29A, old Act. Since 1920, there has been a High Commissioner for India in London, appointed under the provisions of an Order in Council. Various agency functions on behalf of the Central and the Provincial Governments which were formerly discharged by the India Office have been transferred to him. Under the new Act, he is to be appointed by the Governor-General. The High Commissioner for India is not subject to the orders of the Secretary of State nor is his establishment part of India Office. The appointment of the High Commissioner will be made by the Governor-General in his individual judgement. His duties will be prescribed by the Governor-General and will include the purchase of Government stores. It is to be noted that the various governments in India, in agreement with their legislatures, were free under the old constitution, by convention, from the control of the Secretary of State as regards the policy adopted in regard to the purchase of stores, other than military stores. The High Commissioner will perform for India the functions of agency, as distinguished from political functions, analogous to those now performed in the offices of the High Commissioners of the Dominions. It is open to the Provincial Governments, with the sanction of the Governor-General (or the government of a Federated State or of Burma) to employ the agency of the High Commissioner for such purposes as may be determined by the Provincial Governments.

Although for commercial purposes the High Commissioner for India ranks with the other Dominions, his normal duties do not include matters connected with foreign affairs or defence. The new Act does not abolish the India Office: communication on questions of policy as between the Home and Indian Governments will be addressed to the India Office direct, and not by the High Commissioner on the instruction of the

Government of India. The High Commissioner, whose duties are mainly of agency character, may be and frequently is, appointed to represent the Government of India on such international bodies as the Imperial Conference and the League of Nations. The Indian Delegation to the Ottawa Conference communicated with the Government of India through the High Commissioner. The High Commissioner was, on one occasion directed by the Government of India, to conduct trade negotiations with the Irish Free State. The office of the High Commissioner is located in an impressive building known as the India House.

The High Commissioner's work is performed in the following departments:

(1) The Accounts department, which makes all payments on behalf of the High Commissioner and whose transaction amounted to nearly £7,000,000 in 1935, is responsible for payment of pensions and leave allowances, and deals with all problems arising in connexion with the salaries and conditions of the personnel in the High Commissioner's office. It also sanctions extension of leave to officers from India for limited periods.

(2) The principal function of the General department is to make arrangements for the recruitment of staff for the office and for Government and public bodies in India. It exercises supervision over officers on deputation or study leave and obtains facilities for them and other accredited persons, official or non-official. It arranges passage to India for officials. It protects the interests of, and where necessary repatriates, distressed Indian seamen and generally assists other Indian nationals.

(3) The Public department, which was formed in 1931, deals primarily with international and inter-imperial matters. The principal organization it has to deal with at present is the International Labour Office at Geneva, the main function of which is to look after the working conditions and welfare of labour in all the countries of the world which are members of the International Labour Organization. The High Commissioner has a seat in the Governing Body of the International Labour Office and on the managing board of the following bodies:

(*a*) The International Institute of Agriculture.
(*b*) The Imperial Economic Committee.
(*c*) The Imperial Shipping Committee.
(*d*) The Imperial Agricultural Bureau.

(4) The Trade department is actually older than the office of the High Commissioner, as the first Trade Commissioner to London was appointed in 1917. There are three Trade Commissioners under the High Commissioner for India. The Trade Commissioner in London covers Great Britain and America. The Trade Commissioner in Hamburg deals with Germany and the northern half of Europe. The Trade Commissioner in Milan watches over Indian trade in Italy and the southern half of Europe. The main work of the department is to develop the exports of Indian products to Europe and America. It represents India on various Imperial and Trade Committees in the United Kingdom. Associated with this department are the Indian Trade Publicity Officer, the Timber Adviser, the Mineral Adviser, and a special officer to direct lac researches.

(5) The Stores department of the High Commissioner for India is not located in the India House. The duties entrusted to this department may be briefly described as the purchase, inspection and shipment of stores required by the Central and Provincial Governments of India.

The articles purchased are of the greatest possible variety. They include vessels for the Royal Indian Navy, generating machinery and transmission plants for hydro-electric projects, munitions of war, tanks, clothing and food-stuffs for the army, motor vehicles, surgical instruments and drugs.

(6) The duties of the Education department which is the smallest in the India House and which consists of only 12 officials out of a total of 600 officers, are:

(a) to furnish Indians both directly and through institutions with informations regarding educational facilities in Great Britain;
(b) to obtain admission for them to educational institutions;
(c) to assist them to obtain professional and technological training;
(d) to supervise State scholars and others who may be placed under the High Commissioner's guardianship; and
(e) generally to strive for the welfare of Indian students.

The High Commissioner's Office: The Provisions of Part X of the Act are to apply to appointments to, and to persons serving in, the staff of the High Commissioner for India, as if the members of the staff rendered service in India. All persons who were immediately before the commencement of Part III of this Act members of the High Commissioner's staff, shall continue to be so, and they hold their posts under the same conditions of pay, pensions, etc. as before. See ss. 251 and 252.

Pensions: The High Commissioner is to be provided with sufficient funds by the Federation or a Province to enable him to pay the pensions payable out of the Federal or the Provincial revenues. See s. 157(2).

General Provisions

303.—(1) The Sheriff of Calcutta shall be appointed annually by the Governor of Bengal from a panel of three persons to be nominated on the occasion of each vacancy by the High Court in Calcutta. Provisions as to Sheriff of Calcutta

(2) The Sheriff shall hold office during the pleasure of the Governor and shall be entitled to such remuneration as the Governor may determine and no other remuneration.

(3) In exercising his powers with respect to the appointment and dismissal of the Sheriff, and with respect to the determination of his remuneration, the Governor shall exercise his individual judgment.

By the first Charter granted to the United Company in 1726 by 13 Geo. 1, a mayor and 4 aldermen were appointed at each of the settlements of Madras, Bombay and Calcutta, and they were constituted a Court of Record. A sheriff could be appointed for the above towns and for any space within ten miles of the same. But no sheriff seems to have been appointed under this Charter. By Cl. (9) of the Charter of George III of 26 March 1774, establishing the Supreme Court of Judicature at Fort William of Bengal, it was provided that the Supreme Court of Judicature shall on the first Tuesday of December every year, nominate three residents of the town of Calcutta to the Governor-General and Council, who within three days after such nomination shall appoint one

of the three persons to serve as sheriff for the year from 20 December next, such sheriff remaining in office for one whole year therefrom, and that sheriff and deputies appointed by him are authorized to execute all writs, summonses, rules, orders, warrants and processes of the Supreme Court of Judicature and to make return of the same to that Court and to detain in prison persons committed to him for the purpose by the Supreme Court. In December 1774, the first sheriff of Calcutta was appointed, Mr James McRabey, brother-in-law of Sir Philip Francis. Clause 9 of the Charter of 1774 was still in force (except the provision regarding official oath) till the new Act. By this section, the Governor in the exercise of his individual judgement is to appoint annually a sheriff from a panel of three persons. All the money realized by the sheriff from fees for writs, poundage, etc. were taken by the sheriff who paid the salary of the staff employed in the sheriff's office and took the balance. In Bombay and Madras, all this money is credited to Government and the sheriffs there receive no emoluments, but that is not so in Calcutta. There has been a proposal in Calcutta under which Government is to manage the sheriff's office under an official, and all the balance left after payment of salaries and allowances to those employed in this office, is to be credited to Government. It is open to the Governor to fix a remuneration for the sheriff but it is expected that the office will be purely an honorary one.

Persons acting as Governor-General or Governor

304. Any person appointed by His Majesty to act as Governor-General or as the Governor of a Province during the absence of the Governor-General or the Governor from India, or during any period during which the Governor-General or the Governor is for any reason unable to perform the duties of his office, shall during, and in respect of, the period while he is so acting have all the powers and immunities, and be subject to all the duties of, the Governor-General or Governor, as the case may be, and, if he holds any other office, shall not act therein or be entitled to the salary and allowances appertaining thereto while he is acting as Governor-General or Governor.

S. 90 of the old Act dealt with temporary vacancy in the office of the Governor-General which was to be filled by the most senior Governor of Provinces in India. This section deals with the privileges of the person appointed by His Majesty to act for the Governor-General or for a Governor. Paragraph 5 of the Third Schedule deals with the salary, allowances and privileges of the person so acting. Such a person will enjoy all the powers and immunities of the Governor-General or the Governor, e.g. he enjoys the protection under s. 306.

See s. 7(3), and notes.

Secretarial staffs of Governor-General and Governor

305.—(1) The Governor-General and every Governor shall have his own secretarial staff to be appointed by him in his discretion.

(2) The salaries and allowances of persons so appointed and the office accommodation and other facilities to be

provided for them shall be such as the Governor-General or, as the case may be, the Governor may in his discretion determine, and the said salaries and allowances and the expenses incurred in providing the said accommodation and facilities shall be charged on the revenues of the Federation or, as the case may be, the Province.

Having regard to the important duties of the Governor, particularly in connexion with his special responsibilities the Joint Committee in paragraph 101 of their Report approved of the proposal in the W.P. that the Governor should have at his disposal an adequate personal and secretarial staff of his own and that the salary and allowances of such a staff should be fixed by Order in Council and, though included in the Budget, were not to be submitted to the vote of the Legislature. At the head of this staff, there should be a capable and experienced officer of high standing. He should be a man fully conversant with the current affairs of the Province and in close contact with the administration. In some respects he will occupy the position formerly occupied by the Governor's Private Secretary but with duties of a wider and a more responsible character. In the Presidencies, it may be assumed that the Governor's Secretary will be of the rank of an Executive Councillor under the old constitution, and in the other Governor's Provinces he will be of the rank of a Collector. The Governor's secretariat under the Act, will be a department between the Ministry and the Governor.

Protection of Governor-General, Governor or Secretary of State

306.—(1) No proceedings whatsoever shall lie in, and no process whatsoever shall issue from, any court in India against the Governor-General, against the Governor of a Province, or against the Secretary of State, whether in a personal capacity or otherwise, and, except with the sanction of His Majesty in Council, no proceedings whatsoever shall lie in any court in India against any person who has been the Governor-General, the Governor of a Province, or the Secretary of State in respect of anything done or omitted to be done by any of them during his term of office in performance or purported performance of the duties thereof:

Provided that nothing in this section shall be construed as restricting the right of any person to bring against the Federation, a Province, or the Secretary of State such proceedings as are mentioned in Chapter III of Part VII of this Act.

(2) The provisions of the preceding subsection shall apply in relation to His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States as they apply in relation to the Governor-General.

Under s. 110 (1), old Act, neither the Governor-General nor any of the Governors nor any member of their Cabinet shall be subject to the original jurisdiction of the High Court by reason of anything done or ordered to be done by him in his public capacity, or liable to be arrested or imprisoned in any suit in the Original Side of the High Court. But under old s. 111, neither the Governor-General nor any member of his Executive Council nor any person acting under their orders is exempt from any proceedings before any competent court in England.

This section confers legal immunity upon the Governor-General, the Governor and the Secretary of State. These officers of State, whether in a personal capacity or otherwise, cannot be sued or prosecuted in any court in India in respect of anything done or omitted to be done by them during their term of office, in the performance or purported performance of their duties. This immunity from legal proceedings in Indian courts is to continue even after retirement. But this protection may be removed and action may be started against these officers after their retirement, if the sanction of His Majesty in Council has been previously obtained for this specific purpose. But this section does not restrict the right to bring against the Federation, a Province or the Secretary of State such proceedings as are mentioned in Chapter III of Part VII of the Act which deals with property, contracts and suits. This section only applies to proceedings in Indian courts. At Common Law, the Governor of any territories of the Crown is liable to a civil action for acts done in his private and unofficial capacity both in the Courts of the Colony and in the Courts of King's Bench in England.[1] He may also be sued in England for acts done in his official capacity, but outside the limits of his authority or for acts which, though done officially and apparently within the limits of his commission, are such as the Crown through his Ministers cannot legally do; for the orders of the Crown are no excuse for such acts.[2] The defence of political necessity is available to Governors in all civil proceedings in the absence of statutory justification, where the act complained of is within the authority of the Crown and also within the limited authority conferred by the Crown upon the Governor. Different considerations arise, however, in the case of a Viceroy.[3] But the action complained of must be tortious, both in the view of the English law and of local law, and action can be barred, therefore, if the local Legislature legalises the action impugned.[4] But a Governor is not liable either in England or in the Colony for any act done within the authority of his commission.

Governors are liable to criminal proceedings in the Court of King's Bench in England under the Governor's Act[5] 'for acts of oppression within the area of their command, or for any other crime or offence contrary to the laws of the realm or in force within their respective Governments or commands'. The Governor's Act was extended by a subsequent Act, the Criminal Jurisdiction Act, 1802[6] to 'all persons in

[1] *Hill* v. *Bigge* (1841) 3 Moo. P.C. 465; *Cameron* v. *Kyte* (1835) 3 Knapp. 332 P.C.

[2] *Mostyn* v. *Fabrigas* (1774) 1 Cowp. 161 at p. 172; 1 Smith's L.C. (13th ed.) 642; *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102 at 11-12; *Phillips* v. *Eyre* (1869) L.R. 4 Q.B. 225.

[3] *Luby* v. *Lord Wodehouse* (1865) 17 Ir. C.L. R. 618.

[4] See *Phillips* v. *Eyre* (above).

[5] 11 & 12 Will III, c. 12.

[6] 42 Geo. 111, c. 85.

His Majesty's service, in any civil or military capacity out of Great Britain, guilty of any crime, misdemeanour or offence, in the execution of, or under colour or in the exercise of any such employment'. The old Act dealt with certain offences committed by any person holding office under the Crown in India; e.g. under s. 124 of that Act any servant of the Crown who within his jurisdiction or in the exercise of his authority oppressed any British subject was guilty of a misdemeanour. Under s. 127 of the old Act, if a person holding office under the Crown in India commits any offence under that Act or any offence against any person within his jurisdiction or subject to his authority, the offence may also be tried before His Majesty's Court of Justice, to be dealt with as if committed in the county of Middlesex; and further, any British subject committing any offence within India but outside British India, may be tried in the United Kingdom as if the offence had been committed in British India. Ss. 128 and 129 of the old Act refer to the prosecution of offences referred to in s. 127, before a High Court in British India and the penalties that may be imposed by a High Court, including deportation to Great Britain. Thus under the old Act, persons holding office under the Crown in India and certain British subjects were subject to the jurisdiction of the English as well as the Indian courts. These sections of the old Act have been repealed, and this new section provides for the immunity of the Viceroy, the Governor-General, the Governor and the Secretary of State from proceedings in any Indian court, unless such proceedings have been authorized by His Majesty in Council. But under the English statutes cited, Governors and all persons in His Majesty's service out of Great Britain are liable to prosecution in England.[1] So the new Act has practically abrogated the liability of these officials to proceedings before Indian courts.

Removal of certain disqualifications on the occasion of the first elections to Legislature

307. For the purposes of the first elections of persons to serve as members of the Federal Legislature and of Provincial Legislatures, no person shall be subject to any disqualification by reason only of the fact that he holds—

(*a*) an office of profit as a non-official member of the Executive Council of the Governor-General or a Governor, or as a minister in a Province;

(*b*) an office which is not a whole time office remunerated either by salary or by fees.

See notes to s. 26 (1) (*a*) under OFFICE OF PROFIT. Under the Non-Official (Definition) Rules made under the old Act, a person who is not both a whole-time servant of Government and remunerated by salary or fees was a non-official and could stand for election. Under old s. 80B, a minister was not regarded as an official so as to be disqualified to be elected member of the local Legislature. Under the new Act, a minister, a public prosecutor or a part-time lecturer in a Government college would be holding an office of profit and so would be disqualified from standing for election. This section is a temporary measure permitting such persons to stand for the first election. An Act of the

[1] See Ilbert's *Government of India* (3rd ed.), Article 117 at p.283.

Legislature will have to be passed subsequently declaring what offices will not be regarded as offices of profit within the meaning of s. 26 (1) (*a*) and s. 69 (1) (*a*).

Procedure as respects proposals for amendment of certain provisions of Act and Orders in Council

308.—(1) Subject to the provisions of this section, if the Federal Legislature or any Provincial Legislature, on motions proposed in each Chamber by a minister on behalf of the council of ministers, pass a resolution recommending any such amendment of this Act or of an Order in Council made thereunder as is hereinafter mentioned, and on motions proposed in like manner, present to the Governor-General or, as the case may be, to the Governor an address for submission to His Majesty praying that His Majesty may be pleased to communicate the resolution to Parliament, the Secretary of State shall, within six months after the resolution is so communicated, cause to be laid before both Houses of Parliament a statement of any action which it may be proposed to take thereon.

The Governor-General or the Governor, as the case may be, when forwarding any such resolution and address to the Secretary of State shall transmit therewith a statement of his opinion as to the proposed amendment and, in particular, as to the effect which it would have on the interests of any minority, together with a report as to the views of any minority likely to be affected by the proposed amendment and as to whether a majority of the representatives of that minority in the Federal or, as the case may be, the Provincial Legislature support the proposal, and the Secretary of State shall cause such statement and report to be laid before Parliament.

In performing his duties under this subsection the Governor-General or the Governor, as the case may be, shall act in his discretion.

(2) The amendments referred to in the preceding subsection are—

(*a*) any amendment of the provisions relating to the size or composition of the Chambers of the Federal Legislature, or to the method of choosing or the qualifications of members of that Legislature, not being an amendment which would vary the proportion between the number of seats in the Council of State and the number of seats in the Federal Assembly, or would vary, either as regards the Council of State or the Federal Assembly, the proportion between the number of seats allotted to

British India and the number of seats allotted to Indian States;

(*b*) any amendment of the provisions relating to the number of Chambers in a Provincial Legislature or the size or composition of the Chamber, or of either Chamber, of a Provincial Legislature, or to the method of choosing or the qualifications of members of a Provincial Legislature;

(*c*) any amendment providing that, in the case of women, literacy shall be substituted for any higher educational standard for the time being required as a qualification for the franchise, or providing that women, if duly qualified, shall be entered on electoral rolls without any application being made for the purpose by them or on their behalf; and

(*d*) any other amendment of the provisions relating to the qualifications entitling persons to be registered as voters for the purposes of elections.

(3) So far as regards any such amendment as is mentioned in paragraph (*c*) of the last preceding subsection, the provisions of subsection (1) of this section shall apply to a resolution of a Provincial Legislature whenever passed, but, save as aforesaid, those provisions shall not apply to any resolution passed before the expiration of ten years, in the case of a resolution of the Federal Legislature, from the establishment of the Federation, and in the case of a resolution of a Provincial Legislature, from the commencement of Part III of this Act.

(4) His Majesty in Council may at any time before or after the commencement of Part III of this Act, whether the ten years referred to in the last preceding subsection have elapsed or not, and whether any such address as is mentioned in this section has been submitted to His Majesty or not, make in the provisions of this Act any such amendment as is referred to in subsection (2) of this section:

Provided that—

(i) if no such address has been submitted to His Majesty, then, before the draft of any Order which it is proposed to submit to His Majesty is laid before Parliament, the Secretary of State shall, unless it appears to him that the proposed amendment is of a minor or drafting

nature, take such steps as His Majesty may direct for ascertaining the views of the Governments and Legislatures in India who would be affected by the proposed amendment and the views of any minority likely to be so affected, and whether a majority of the representatives of that minority in the Federal or, as the case may be, the Provincial Legislature support the proposal;

(ii) the provisions of Part II of the First Schedule to this Act shall not be amended without the consent of the Ruler of any State which will be affected by the amendment.

The Federal Legislature has powers under s.108, to vary or alter the provisions of the Imperial Acts, applying to India but these do not extend to the enactment of any law affecting or modifying the provisions of this Act. The Act does not confer general constituent powers on the Indian Legislatures and consequently no constitutional amendment can be made otherwise than by Act of Parliament. The observations of the Joint Select Committee on the subject in paragraph 375 are as follows:

> We are satisfied that, though there are various matters in the Constitution Act which after an interval of time, might in principle be left quite appropriately to modification by the Central or Provincial Legislatures, as the case may be, as subsequent experience may show to be desirable, it is not practical politics here and now to confer such powers upon them. It would be necessary not merely to decide what matters could thus be dealt with but also to devise arrangements to ensure that various interests affected by any proposed modification were given full opportunity to express their views and that changes which they regarded as prejudicial to themselves could not be forced upon them by an inconsiderate majority. With a constitution necessarily so framed as to preserve so far as may be a nice balance between the conflicting interests of Federation, States and Provinces, of minority and majority, and indeed, of minority and minority, and with so much that is unpredictable in the effects of inter-play of these forces, it is plain that it would be a matter of extreme difficulty to devise arrangements likely to be acceptable to all those who might be affected; and it would probably be found that the balance could only be preserved and existing statutory rights only guaranteed by a number of restrictions and conditions upon the exercise of the constituent powers which would make them in practice unworkable. But, whether or not this can reasonably be regarded as a defect in the Constitution Act, we do not think that the question is one of immediate importance, since we should have been bound in any event to recommend that the main provisions of the Act should remain unaltered for an appreciable period, in order to ensure that the Constitution is not subjected at the outset to the disturbances which might follow hasty attempts to modify its details.

There is another difficulty which is inherent in every federal constitution. The Indian Federation is a union of the British Indian Provinces and the Indian States which accede to the Federation on the basis of the Government of India Act, 1935. The States are, therefore, entitled to say, that so far as any constitutional amendment affects them, it should not be carried into effect without their approval. The Second Schedule to the Act provides that amendments of specified portions of the Act (which can only be made under the provisions of this and succeeding sections) will not affect the validity of the Instrument of Accession. See also Part II of the First Schedule which deals with the provisions relating to the representation of the Indian States in the Federal Legislature. It is also laid down in the Act that no Order in Council can be made amending these provisions without the consent of the Ruler of the State concerned.

While the Act makes no specific grant of constituent powers to authorities in India, this section provides for a plan whereby the Indian Legislatures may be associated with the modification hereafter of the provisions of the Act or of any Order in Council relating to the composition and the size of the Legislatures or the qualifications of the electors. It will be competent for any Legislature to pass a resolution on the motion of a minister advocating a constitutional change and to present an address to the Governor-General or Governor, as the case may be, praying that His Majesty may be pleased to communicate it to the Parliament. The resolution shall be laid before the both Houses of Parliament not later than six months after its receipt, with a statement of the action which His Majesty's Government propose to take upon it. But the procedure which is laid down in this section, shall be subject to the following conditions:

(*a*) That the resolution shall be confined in scope to matters concerning composition of, and the franchise for, the Legislature;

(*b*) That the Federal Legislature should have no power to propose an alteration in the size or composition of either Chamber which would involve a variation of the proportion of the seats allotted to the States and the Provinces respectively or of the relative size of the two Houses;

(*c*) That the procedure shall not come into force until after ten years, in the case of the Provincial Legislatures from the inauguration of the Provincial Autonomy, and in the case of the Federal Legislature from the inauguration of the Federation; except that any Provincial Legislature shall have power to propose the removal of the 'application' requirement and the lowering of the educational standard to literacy in the case of women voters after the first election in the Province under the new Constitution;

(*d*) That the Governor-General or the Governor, as the case may be, shall be required in forwarding a resolution, to state his own views on the question of its effect upon the interests of any minority or minorities; and finally

(*e*) That the resolution shall be proposed on the motion and responsibility of the Federal or Provincial ministers as the case may be.

It would be observed that the Indian Legislatures have only been given powers to express by resolution to His Majesty's Government,

their intention of a constitutional change in respect of the matters specified in this section. But the actual power of modifying the Act has been placed by the Act in the hands of His Majesty's Government by Order in Council laid in draft before both Houses as provided in s. 309. In other words, no amending legislation by Parliament will be required. In respect of these and other matters specifically mentioned in the Act variations may be made by Order in Council.

Cl. (4) : His Majesty in Council may at any time, whether the ten years referred to has elapsed or not and whether any address mentioned in Cl. (1) has been submitted or not, make any such amendment in the provisions of the Act. In a statement issued by the Government of India on the authority of His Majesty's Government on 3 July 1935, it was pointed out that the necessity for these powers was due to such reasons as the following:

(*a*) It is impossible to foresee when necessity may arise for amending minor details connected with the franchise and the constitution of the Legislatures, and for such amendment it would clearly be disadvantageous to have no method available short of a fresh amending Act of Parliament, nor is it practicable statutorily to separate out such detail from more important matters such as those covered by the terms of the Communal Award.

(*b*) It might also become desirable, in the event of a unanimous agreement between communities in India, to make modifications in the provisions based upon the Communal Award and for such agreed changes it would also be disadvantageous to have no other method available than an amending Act of Parliament.

The statement added that within the range of the Communal Award His Majesty's Government would not propose, in the exercise of any powers conferred by this clause, to recommend to Parliament any changes, unless such changes has been agreed to between the communities concerned.

The new Act has been amended by Order in Council made under s. 308(4), by Part I, paragraph 23 of the Government of India (Provincial Legislative Assemblies) Order, 1936, whereby certain minor amendments have been made in the Fifth and the Sixth Schedules of the Act; and by paragraphs 2 and 3 of the Government of India (Federal Legislature Amendment) Order, 1936, whereby amendments have been made in Part II of the First Schedule to the Act.

Orders in Council

309.—(1) Any power conferred by this Act on His Majesty in Council shall be exercisable only by Order in Council, and subject as hereinafter provided, the Secretary of State shall lay before Parliament the draft of any Order which it is proposed to recommend His Majesty to make in Council under any provision of this Act, and no further proceedings shall be taken in relation thereto except in pursuance of an address presented to His Majesty by both Houses of Parliament praying that the Order may be made either in the form of the draft, or with such amendments as may have been agreed to by resolutions of both Houses :

Provided that, if at any time when Parliament is dissolved or prorogued, or when both Houses of Parliament are adjourned for more than fourteen days, the Secretary of State is of opinion that on account of urgency an Order in Council should be made under this Act forthwith, it shall not be necessary for a draft of the Order to be laid before Parliament, but the Order shall cease to have effect at the expiration of twenty-eight days from the date on which the Commons House first sits after the making of the Order unless within that period resolutions approving the making of the Order are passed by both Houses of Parliament.

(2) Subject to any express provision of this Act, His Majesty in Council may by a subsequent Order, made in accordance with the provisions of the preceding subsection, revoke or vary any Order previously made by him in Council under this Act.

(3) Nothing in this section applies to any Order of His Majesty in Council made in connection with any appeal to His Majesty in Council, or to any Order of His Majesty in Council sanctioning the taking of proceedings against a person who has been the Governor-General, His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, the Governor of a Province or the Secretary of State.

See J.C.R. 376–79; and notes to s. 1, under ORDER IN COUNCIL.

The Order in Council is a principal method of giving the force of law to executive acts. The Privy Council acts as the formal medium for giving expression to the measures determined on by the Crown on the advice of its ministers in the exercise of the executive functions which it possesses, either by virtue of the Common Law prerogative or of statutory authority. The Crown expresses its wishes over a very wide range of subordinate legislation by Order in Council. It is one of the recognized modes of exercising delegated legislative authority. The powers conferred by the Statute in regard to the functions of delegated legislation may be classified as follows: (i) supplementing the statute in general terms; (ii) adoption of earlier statutes; (iii) amendment of the statute itself; and (iv) determination of the time and area of application.

Provisions have been made in the Act reserving power to the King in Council to enact measures under various sections which will have the force of Acts of Parliament. The form to be assumed for such legislation is that of an Order in Council which will not have statutory effect unless the procedure prescribed by this section has been complied with. In *The King* v. *Minister of Health, ex parte Yaffe*[1], the House of Lords expressed the opinion that if an Order did not comply with the statutory conditions, it was open to question. In the same case, the Court of

[1] (1931) A. C. 494.

Appeal declined to take judicial notice of a departmental order expressed to have statutory effect on the ground that the procedure prescribed by the statute had not been followed. By Order in Council, the Executive have no power to prescribe or alter the law.[1]

This section lays down the procedure to be followed in promulgating Orders in Council under the authority of this Act. The Order in Council must be laid in draft before Parliament, and is to be approved by resolutions of both Houses before it takes effect. In circumstances of emergency when the Parliament is not sitting, the Order in Council will become operative before the approval by resolutions of both Houses of Parliament has been obtained, but will cease to operate unless such approval is obtained within the period specified in the proviso to subsection (1). If the Orders in Council conform to the requirements of this section, they are to have the same force as if enacted in the Act itself. Orders in Council in connexion with appeals and in connexion with sanction of proceedings against Viceroy, etc. are exempt from these requirements.

The Act also provides for the amendment and repeal of an existing Order in Council by a subsequent Order in Council. See s. 308, which lays down the procedure to be followed at the time of altering or repealing an Order in Council.

For the list of Orders in Council see Appendix III.

Power of His Majesty in Council to remove difficulties

310.—(1) Whereas difficulties may arise in relation to the transition from the provisions of the Government of India Act to the provisions of this Act, and in relation to the transition from the provisions of Part XIII of this Act to the provisions of Part II of this Act:

And whereas the nature of those difficulties, and of the provision which should be made for meeting them, cannot at the date of the passing of this Act be fully foreseen:

Now therefore, for the purpose of facilitating each of the said transitions His Majesty may by Order in Council—

(*a*) direct that this Act and any provisions of the Government of India Act still in force shall, during such limited period as may be specified in the Order, have effect subject to such adaptations and modifications as may be so specified;

(*b*) make, with respect to a limited period so specified such temporary provision as he thinks fit for ensuring that, while the transition is being effected and during the period immediately following it, there are available to all governments in India and Burma sufficient revenues to enable the business of those governments to be carried on; and

[1] *The Zamora* (1916) 2 A. C. 77 at p. 90.

(c) make such other temporary provisions for the purpose of removing any such difficulties as aforesaid as may be specified in the Order.

(2) No Order in Council in relation to the transition from the provisions of Part XIII of this Act to the provisions of Part II of this Act shall be made under this section after the expiration of six months from the establishment of the Federation, and no other Order in Council shall be made under this section after the expiration of six months from the commencement of Part III of this Act.

His Majesty may by Order in Council remove difficulties which may arise during the transition from the old Act to the new and during the transition from the establishment of the Provincial Autonomy under Part III of this Act, to the establishment of the Federation under Part II of this Act. By such Order His Majesty may direct that this Act and certain provisions of the old Act, subject to specified modification, shall apply during a limited period. No Order in Council under this section can be made after the expiry of 6 months from 1 April 1937. The Government of India (Commencement and Transitory Provisions) Order, 1936, and the (Commencement and Transitory (Provisions) (No. 2) Order 1936, make provisions for the purpose of facilitating the transition from the old Act to the new Act.

See the India, Burma and Aden (Transitory Provisions) (Taxation) Order, 1937, which deals with the amount payable in respect of taxation in accordance with certain central enactments mentioned therein, before the separation of Burma and Aden from India.

See notes to s. 273 under the GOVERNMENT OF INDIA (FAMILY PENSIONS FUNDS) ORDER, 1937.

See the India and Burma (Transitory Provisions) Order, 1937, repealing paragraphs 9 and 10, and modifying paragraph 3(2) of the Government of India (Commencement and Transitory Provisions) Order, 1936, and making certain modifications and adaptations in the Act during a limited period for the purpose of facilitating the transition from the old Act to the new Act.

Interpretation

311.—(1) In this Act and, unless the context otherwise requires, in any other Act the following expressions have the meanings hereby respectively assigned to them, that is to say:— Interpretation, etc.

'British India' means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces;

'India' means British India together with all territories of any Indian Ruler under the

suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, the tribal areas, and any other territories which His Majesty in Council may, from time to time, after ascertaining the views of the Federal Government and the Federal Legislature, declare to be part of India;

'Burma' includes (subject to the exercise by His Majesty of any powers vested in him with respect to the alteration of the boundaries thereof) all territories which were immediately before the commencement of Part III of this Act comprised in India, being territories lying to the east of Bengal, the State of Manipur, Assam and any tribal areas connected with Assam;

'British Burma' means so much of Burma as belongs to His Majesty;

'Tribal areas' means the areas along the frontiers of India or in Baluchistan which are not part of British India or of Burma or of any Indian State or of any foreign State;

'Indian State' includes any territory, whether described as a State, an Estate, a Jagir or otherwise, belonging to or under the suzerainty of a Ruler who is under the suzerainty of His Majesty and not being part of British India;

'Ruler' in relation to a State means the Prince, Chief or other person recognised by His Majesty as the Ruler of the State.

(2) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:—

'agricultural income' means agricultural income as defined for the purposes of the enactments relating to Indian income-tax;

'borrow' includes the raising of money by the grant of annuities and 'loan' shall be construed accordingly;

'chief justice' includes in relation to a High Court a chief judge or judicial commissioner, and 'judge' includes an additional judicial commissioner;

'corporation tax' means any tax on so much of the income of companies as does not represent agri-

cultural income, being a tax to which the enactments requiring or authorising companies to make deductions in respect of income-tax from payments of interest or dividends, or from other payments representing a distribution of profits, have no application;

'corresponding Province' means in case of doubt such Province as may be determined by His Majesty in Council to be the corresponding Province for the particular purpose in question;

'debt' includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and 'debt charges' shall be construed accordingly;

'existing Indian law' means any law, ordinance, order, byelaw, rule or regulation passed or made before the commencement of Part III of this Act by any legislature, authority or person in any territories for the time being comprised in British India, being a legislature, authority or person having power to make such a law, ordinance, order, byelaw, rule or regulation;

'goods' includes all materials, commodities, and articles;

'guarantee' includes any obligation undertaken before the commencement of Part III of this Act to make payments in the event of the profits of an undertaking falling short of a specified amount;

'High Court' does not, except where it is expressly so provided, include a High Court in a Federated State;

'Local Government' means any such Governor in Council, Governor acting with ministers, Lieutenant-Governor in Council, Lieutenant-Governor or Chief Commissioner as was at the relevant time a Local Government for the purposes of the Government of India Act or any Act repealed by that Act, but does not, save where the context otherwise requires, include any local Government in Burma or Aden;

'pension' in relation to persons in or formerly in the service of the Crown in India, Burma or Aden, means a pension, whether contributory or not, of any kind whatsoever payable to or in

respect of any such person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund;

'pleader' includes advocate;

'Provincial Act' and 'Provincial law' mean, subject to the provisions of this section, an Act passed or law made by a Provincial Legislature established under this Act;

'public notification' means a notification in the Gazette of India or, as the case may be, the official Gazette of a Province;

'securities' includes stock;

'taxation' includes the imposition of any tax or impost whether general or local or special, and 'tax' shall be construed accordingly;

'railway' includes a tramway not wholly within a municipal area;

'federal railway' does not include an Indian State railway but, save as aforesaid, includes any railway not being a minor railway;

'Indian State railway' means a railway owned by a State and either operated by the State, or operated on behalf of the State otherwise than in accordance with a contract made with the State by or on behalf of the Secretary of State in Council, the Federal Government, the Federal Railway Authority, or any company operating a federal railway;

'minor railway' means a railway which is wholly situate in one unit and does not form a continuous line of communication with a federal railway, whether of the same gauge or not; and

'unit' means a Governor's Province, a Chief Commissioner's Province or a Federated State.

(3) No Indian State shall, for the purpose of any reference in this Act to Federated States, be deemed to have become a Federated State until the establishment of the Federation.

(4) In paragraph (3) of section eighteen of the Interpretation Act, 1889 (which paragraph defines the expression 'colony') for the words 'exclusive of the British Islands and of British India' there shall be substituted the words

'exclusive of the British Islands and of British India and of British Burma.'

(5) Any Act of Parliament containing references to India or any part thereof, to countries other than or situate outside India or other than or situate outside British India, to His Majesty's dominions, to a British possession, to the Secretary of State in Council, to the Governor-General in Council, to a Governor in Council or to Legislatures, courts, or authorities in, or to matters relating to the government or administration of India or British India shall have effect subject to such adaptations and modifications as His Majesty in Council may direct, being adaptations and modifications which appear to His Majesty in Council to be necessary or expedient in consequence of the provisions of this Act or the Government of Burma Act, 1935.

Any power of any legislature under this Act to repeal or amend any Act adapted or modified by an Order in Council under this subsection shall extend to the repeal or amendment of that Order, and any reference in this Act to an Act of Parliament shall be construed as including a reference to any such Order.

(6) Any reference in this Act to Federal Acts or laws or Provincial Acts or laws, or to Acts or laws of the Federal or a Provincial Legislature, shall be construed as including a reference to an ordinance made by the Governor-General or a Governor-General's Act, or as the case may be, to an ordinance made by a Governor or a Governor's Act.

(7) References in this Act to the taking of an oath include references to the making of an affirmation.

Cl. (1): 'India' as defined by the Interpretation Act[1] and the Indian General Clauses Act[2] includes not only the territories under the direct sovereignty of the Crown but also the territories of the Native States.

Agricultural income: See notes to s. 138 under this heading.

Corporation Tax: See s. 139 and notes thereto.

Existing Indian law: See ss. 292, 293 and 317.

Local government: See definition in s. 134(4) of the old Act. In List II, item 13, this expression has been used as meaning Local Self-Government. See item I in Part II, Provincial Subjects in Schedule I of the Devolution Rules made under the old Act.

Cl. (6): Reference to Federal Acts or Laws includes reference to Ordinances made by the Governor-General or Governor-General's Acts; similarly in the case of Provincial Acts or Laws.

See the Government of India (Adaptation of Acts of Parliament) Order, 1937, for adaptations and modifications of Acts of Parliament

1 52 & 53 Vict., c. 63, s. 18.

2 Act X of 1897, s. 3 (27).

containing references to India, made by Order in Council made under Cl. (5) of this section. Amendments to the English Army and Air Force Acts, in their application to India, have been made in Part III of the Schedule to the Order.

PART XIII

TRANSITIONAL PROVISIONS

PART XIII

TRANSITIONAL PROVISIONS

INTRODUCTION

As the Joint Committee pointed out, the establishment of provincial autonomy was likely to precede the inauguration of Federation. So the new Act should contain transitory provisions which on the commencement of provincial autonomy should settle during the intervening period, the constitution and powers of the central Government and Legislature which will for the time co-exist along with the autonomous Provinces until the time the former are replaced by the Federal Government and Legislature under the new Act. This part is to apply during the period from 1 April 1937, the date fixed by the Government of India (Commencement and Transitory Provisions) Order, 1936—hereinafter referred to as the said Order,[1]—for the commencement of provincial autonomy and the establishment of the Federation. S. 310 provides for an Order in Council *inter alia* to facilitate the transition from the provisions of the old Act to those of the new Act and to provide, during the transition period (up to 1 April 1937) and after that, that the various governments in India should have sufficient funds to carry on the work of government till the Budget is passed by the new Legislatures coming into existence after 1 April 1937. The Order in Council under s. 310 provides for the transition period from 1936 till 1 April 1937. Part XIII provides for the transition period from 1 April 1937 till the Federation is established.

The general intention underlying the provisions in Part XIII is that the central Government, though deprived of much of its authority under the old Act over the Provinces, should for the intervening period (between the establishment of provincial autonomy and of the Federation), be placed in substantially the same position as that occupied under the old Act by the Governor-General in Council, so it will be necessary to keep in being the existing central Legislature with its existing franchise and the existing number of elected and nominated members, and to keep the existing central Executive. But there must be consequential changes to fit in the present central Legislature and Executive as under the old Act, with provincial autonomy under the new Act. The fundamental feature underlying the new Act is a statutory distribution of legislative powers between the central and the provincial legislature. This will have to be provided for during the transition period. There should be also during the period a statutory distribution of financial powers and resources between the central government and the provincial governments, as when the Federation is actually established. To determine the questions between the centre and the Provinces regarding legislative and financial relationships, there must be a court with the powers of the Federal Court during this period, as there must be a Federal Court under the Federation. Next, it will be as necessary during this period, as under the Federation, to differentiate between the functions of the Governor-General in Council (a corporate body under the old Act exercising almost all the functions of the central Executive) and the Governor-General who during the period

[1] See under s. 310.

(as well as under the Federation) is to have control over the Governor acting in his discretion or acting in his individual judgement. Then the provisions in the new Act regarding settlement of disputes between the Province and Province or between the centre and a Province regarding water rights should be made applicable.

So this chapter provides that during the period intervening between the date of commencement of provincial autonomy (under Part III of the Act) and the establishment of the Federation :

(1) Federation will mean British India, and Federal Legislature will mean the central Legislature as constituted under the old Act.

(2) Governor-General and Federal Government shall mean (except where under the Act the Governor-General is to act in his discretion) the Governor-General in Council.

(3) The executive authority is to be exercised on behalf of His Majesty by the Governor-General in Council.

(4) Matters in the Act left to the Governor-General in his discretion will be regulated by the Governor-General.

(5) As there is no council of ministers to advise the Governor-General, provisions as to the exercise of his individual judgement will not come into force. But he will have special responsibilities similar to those under the Federation.

(6) With regard to the reserved departments,[1] and tribal areas, rules in the new Act shall apply as to (*a*) previous sanction of the Governor-General to legislation, (*b*) broadcasting, (*c*) direction to, and principles to be observed by, the Federal Railway Authority, and (*d*) civil services recruited by the Secretary of State.

(7) The Governor-General and the Governor-General in Council shall be under the general control of the Secretary of State whose particular directions are to be complied with. The Secretary of State shall not give directions to the Governor-General in Council regarding grant or appropriation of revenue except with the concurrence of his advisers who are to be from eight to twelve in number.

(8) Sterling loans are to be raised, not by the Governor-General in Council, but by the Secretary of State authorized by Parliament. But the borrowing must be approved by the Secretary of State with the concurrence of a majority of his advisers.

(9) The Federal Court, the Federal Public Service Commission and the Federal Railway Authority are to be constituted though the Federation has not yet been established, and they will in relation to British India, perform functions similar to those they are to perform in relation to the Federation.

(10) The provisions of the old Act dealing with the Governor-General, the Commander-in-Chief, the Governor-General's Executive Council and the Indian Legislature, with certain modifications, as set out in the Ninth Schedule shall apply notwithstanding the repeal of the old Act by the new Act.

Operation of Part XIII

312. The provisions of this Part of this Act shall apply with respect to the period elapsing between the commencement of Part III of this Act and the establishment of the Federation.

[1] S. 11.

By the Government of India (Commencement and Transitory Provisions) Order, 1936 (hereinafter referred to as the said Order), 1 April 1937 has been fixed as the date for the commencement of Part III of this Act.

See the Government of India (Commencement and Transitory Provisions) Order, 1936, and the (Commencement and Transitory Provisions) (No. 2) Order, 1936.

313.—(1) Subject to the provisions of this Act for the time being in force, such executive authority as is hereinafter mentioned shall be exercised on behalf of His Majesty by the Governor-General in Council, either directly or through officers subordinate to him, but nothing in this section shall prevent the Indian Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor-General in Council any functions conferred by any existing Indian law on any court, judge or officer, or on any local or other authority. Executive Government

(2) Subject to the provisions of this Act for the time being in force, the said executive authority extends—

(*a*) to the matters with respect to which the Indian Legislature has, under the said provisions, power to make laws;

(*b*) to the raising in British India on behalf of His Majesty of naval, military or air, forces and to the governance of His Majesty's forces borne on the Indian establishment;

(*c*) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance or otherwise in and in relation to the tribal areas:

Provided that—

(i) the said authority does not, save as expressly provided in the provisions of this Act for the time being in force, extend in any Province to matters with respect to which the Provincial Legislature has power to make laws;

(ii) the said authority does not extend to the enlistment or enrolment in any force raised in British India of any person unless he is either a subject of His Majesty, or a native of India or of territories adjacent thereto; and

(iii) commissions in any such forces shall be granted by His Majesty, save in so far as he may be pleased to delegate that power by virtue of

the provisions of Part I of this Act or otherwise.

(3) References in the provisions of this Act for the time being in force to the Governor-General and the Federal Government shall, except as respects matters with respect to which the Governor-General is required by the said provisions to act in his discretion, be construed as references to the Governor-General in Council, and any reference to the Federation, except where the reference is to the establishment of the Federation, shall be construed as a reference to British India, the Governor-General in Council or the Governor-General, as the circumstances and the context may require:

Provided that—

(*a*) any reference to the revenues of the Federation shall be construed as a reference to the revenues of the Governor-General in Council;

(*b*) the revenues of the Governor-General in Council shall, subject to the provisions of chapter I of Part VII of this Act with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to Provinces and to the provisions of this Act with respect to the Federal Railway Authority (so far as any such provisions are for the time being in force), include all revenues and public moneys raised or received either by the Governor-General in Council or by the Governor-General;

(*c*) the expenses of the Governor-General in discharging his functions as respects matters with respect to which he is required by the provisions of this Act for the time being in force to act in his discretion shall be defrayed out of the revenues of the Governor-General in Council.

(4) Any requirement in this Act that the Governor-General shall exercise his individual judgment with respect to any matter shall not come into force until the establishment of the Federation, but, notwithstanding that Part II of this Act has not come into operation, the following provisions of this Act, that is to say—

(*a*) the provisions requiring the prior sanction of the Governor-General for certain legislative proposals;

(b) the provisions relating to broadcasting;
(c) the provisions relating to directions to, and principles to be observed by, the Federal Railway Authority; and
(d) the provisions relating to civil services to be recruited by the Secretary of State,

shall have effect in relation to defence, ecclesiastical affairs, external affairs and the tribal areas as they have effect in relation to matters or functions with respect to, or in the exercise of, which the Governor-General is by the provisions of this Act for the time being in force required to act in his discretion, and any reference in any of the provisions of this Act for the time being in force to the special responsibilities of the Governor-General shall be construed as a reference to the special responsibilities which he will have when Part II of this Act comes into operation.

(5) Nothing in this section shall be construed as conferring on the Governor-General in Council any functions connected with the exercise of the functions of the Crown in its relations with Indian States.

Cl. (1): See s. 7 of the Act.
Cl. (2): See s. 8 of the Act.
Cl. (3), Prov. (b): Part VII, Chapter I deals with the distribution of revenues between the Federation and the Federal units. Under the said Order, Part VII will be in force from 1 April 1937. Part VIII and the Eighth Schedule, dealing with the Federal Railway Authority may be brought into force by a subsequent Order under s. 310.
Cl. (4): See Introduction to this Chapter. Defence, ecclesiastical affairs and external affairs form the reserved departments, and under s. 11 (when the Federation comes into operation) the Governor-General will deal with them in his discretion.
Cl. (5): The exercise of the functions of the Crown in its relation to the States will vest in the Viceroy, and not in the Governor-General in Council, as provided in the Act for the Federation. See s. 2(1), Prov.

Control of the Secretary of State

314.—(1) The Governor-General in Council and the Governor-General, both as respects matters with respect to which he is required by or under this Act to act in his discretion and as respects other matters, shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by, the Secretary of State, but the validity of anything done by the Governor-General in Council or the Governor-General shall not be called in question on the ground that it was done otherwise than in accordance with the provisions of this subsection.

(2) The Secretary of State shall not give any direction to the Governor-General in Council with respect to any grant or appropriation of any part of the revenues of the Governor-General in Council except with the concurrence of his advisers.

(3) While this Part of this Act is in operation, the advisers of the Secretary of State shall not be more than twelve, nor less than eight, in number, and, notwithstanding anything in Part XI of this Act with respect to their term of office, on the establishment of the Federation such of the advisers as the Secretary of State may direct shall cease to hold office.

Cl. (1): For the control of the Secretary of State over the Governor-General in matters by which he is required to act in his discretion and in his individual judgement, see s. 14 and notes thereunder. During the transition period, as there is no council of ministers to advise him, there is no scope for the exercise of his individual judgement.

Cl. (3): Under the said Order, Part XI of the Act dealing with the Secretary of State will come into force from 1 April 1937, the date of commencement of Part III of Act, so that the Secretary of State in Council as a statutory corporation will disappear and the Secretary of State under s. 278 will have a body of advisers not less than three and not more than six in number. See Introduction to Part XI and notes to s. 278. But during the period of transition from 1 April 1937 till the date of inauguration of the Federation, the Secretary of State will have from eight to twelve advisers. When Federation is established, such of the advisers as the Secretary of State may direct will cease to hold office, so that the number is reduced to that in s. 278.

Sterling loans

315.—(1) While this Part of this Act is in operation, no sterling loans shall be contracted by the Governor-General in Council, but in lieu thereof, if provision is made in that behalf by an East India Loans Act of the Parliament of the United Kingdom, the Secretary of State may, within such limits as may be prescribed by the Act, contract such loans on behalf of the Governor-General in Council.

(2) The Secretary of State shall not exercise any such powers of borrowing as are mentioned in this section unless at a meeting of the Secretary of State and his advisers the borrowing has been approved by a majority of the persons present.

(3) There shall be inserted—

(*a*) in paragraph (*d*) of subsection (1) of section one of the Trustee Act, 1925, after the words 'on the revenues of India'; and

(*b*) at the end of sub-paragraph (9) of paragraph (*a*) of section ten of the Trusts (Scotland) Act, 1921,

the words ' or in any sterling loans raised by the Secretary ' of State on behalf of the Governor-General of India ' in Council under the provisions of Part XIII of the ' Government of India Act, 1935.'

(4) No deduction in respect of taxes imposed by or under any existing Indian law or any law of the Indian, the Federal, or a Provincial Legislature shall be made, either before or after the establishment of the Federation, from any payment of principal or interest in respect of any loans contracted under this section.

(5) Any legal proceedings in respect of any loan raised under this section may, either before or after the establishment of the Federation, be brought in the United Kingdom against the Secretary of State, but nothing in this section shall be construed as imposing any liability on the Exchequer of the United Kingdom.

Under ss. 161 and 162 of the Act, the borrowing powers of the Secretary of State in Council on the security of Indian revenues will cease upon the commencement of Part III of this Act, and then the Federal Government will have the power to borrow on such security within the limits (if any) fixed by the Federal Legislature. But during the transition period when the Federal Government is not in existence, the Secretary of State if so empowered by an Act of Parliament may borrow on behalf of the Governor-General in Council, provided the borrowing has been approved by the majority of the advisers of the Secretary of State present.

316. The powers conferred by the provisions of this Act for the time being in force on the Federal Legislature shall be exercisable by the Indian Legislature, and accordingly references in those provisions to the Federal Legislature and Federal Laws shall be construed as references to the Indian Legislature and laws of the Indian Legislature, and references in those provisions to Federal taxes shall be construed as references to taxes imposed by laws of the Indian Legislature: Legislature

Provided that nothing in this section shall empower the Indian Legislature to impose limits on the power of the Governor-General in Council to borrow money.

The powers under the various parts of this Act brought into force under the said Order from 1 April 1937, conferred on the Federal Legislature shall be construed as powers given to the Indian Legislature during the period.

Continuance of certain provisions of Government of India Act

317.—(1) The provisions of the Government of India Act set out, with amendments consequential on the provisions of this Act, in the Ninth Schedule to this Act (being certain of the provisions of that Act relating to the Governor-General, the Commander-in-Chief, the Governor-General's Executive Council and the Indian Legislature and provisions supplemental to those provisions) shall, subject to those amendments, continue to have effect notwithstanding the repeal of that Act by this Act:

Provided that nothing in the said provisions shall affect the provisions of the last but one preceding section.

(2) In the said provisions, the expression 'this Act' means the said provisions.

(3) The substitution in the said provisions of references to the Secretary of State for references to the Secretary of State in Council shall not render invalid anything done thereunder by the Secretary of State in Council before the commencement of Part III of this Act.

See notes to ss. 33 and 145, and paragraph 4 of the Government of India (Commencement and Transitory Provisions) (No. 2) Order, 1936.

Provisions as to Federal Court and certain other Federal authorities

318.—(1) Notwithstanding that the Federation has not yet been established, the Federal Court and the Federal Public Service Commission and the Federal Railway Authority shall come into existence and be known by those names, and shall perform in relation to British India the like functions as they are by or under this Act to perform in relation to the Federation when established.

(2) Nothing in this section affects any power of His Majesty in Council to fix a date later than the commencement of Part III of this Act for the coming into operation, either generally or for particular purposes, of any of the provisions of this Act relating to the Federal Court, the Federal Public Service Commission or the Federal Railway Authority.

The provisions of Part X, Chapter III (Public Service Commission) have been brought into force from 1 April 1937, by the (Commencement and Transitory Provisions) Order, 1936,

By the same Order, it was provided that the provisions of Part VIII of the Act (Federal Railway Authority) and of Chapter I of Part IX (Federal Court) were to come into force on such dates as His Majesty in Council might hereafter appoint. Thereafter, the provisions of Chapter I of Part IX of the Act (Federal Court), except s. 206 (power of Federal Court to enlarge appellate jurisdiction) and s. 215 (ancillary powers of the Federal Court), were brought into force from 1 October 1937, by the (Federal Court) Order, 1936. S. 215 was

brought into force from 28 July 1937 by the (Federal Court) Order, 1937. See s. 320.

319.—(1) Any rights acquired by or liabilities incurred by or on behalf of, the Governor-General in Council or the Governor-General between the commencement of Part III of this Act and the establishment of the Federation shall, after the establishment of the Federation, be rights and liabilities of the Federation, and any legal proceedings pending at the establishment of the Federation by or against the Governor-General in Council or the Governor-General shall, after the establishment of the Federation, be continued by or against the Federation.

Rights and liabilities of Governor-General in Council and Governor-General to continue after establishment of Federation

(2) The provisions of subsection (1) of this section shall apply in relation to rights and liabilities of the Secretary of State in Council which have, by virtue of the provisions of this Act, become rights or liabilities of the Governor-General in Council as they apply in relation to the rights and liabilities therein mentioned.

The rights and liabilities of the Governor-General in Council or of the Governor-General during the period will be taken over by the Federation on its being established. As to legal proceedings, see s. 179.

PART XIV

COMMENCEMENT, REPEALS, ETC.

PART XIV

COMMENCEMENT, REPEALS, ETC.

320.—(1) Part II of this Act shall come into force on such date as His Majesty may appoint by the Proclamation establishing the Federation and the date so appointed is the date referred to in this Act as the date of the establishment of the Federation. Commencement

(2) The remainder of this Act shall, subject to any express provision to the contrary, come into force on such date as His Majesty in Council may appoint and the said date is the date referred to in this Act as the commencement of Part III of this Act.

(3) If it appears to His Majesty in Council that it will not be practicable or convenient that all the provisions of this Act which are under the foregoing provisions of this section to come into force on a date therein mentioned should come into operation simultaneously on that date, His Majesty in Council may, notwithstanding anything in this section, fix an earlier or a later date for the coming into operation, either generally or for particular purposes, of any particular provisions of this Act.

By the Government of India (Commencement and Transitory Provisions) Order, 1936, the date of the commencement of Part III of this Act has been fixed as the first day of April 1937. On that date, it has been further provided that all the provisions of the Act are to apply except:

(1) Part II—Federation of India;
(2) Part VII—Federal Railway Authority;
(3) Part IX, Chapter I—Federal Court;
(4) The Eighth Schedule—Federal Railway Authority;
(5) S. 232—Pay of the Commander-in-Chief.

It has been provided by s. 318 that although the Federation may not yet be established, the Federal Court, the Federal Public Service Commission and the Federal Railway Authority are to be established, and that His Majesty may by Order in Council fix a date later than the commencement of Part III of this Act for coming into operation of the provisions of the Act relating to them.

The following Orders in Council have been made under this section: the Government of India (Commencement and Transitory Provisions) Order, 1936, and the (Commencement and Transitory Provisions) (No. 2) Order, 1936.

321. The Government of India Act shall be repealed and the other Acts mentioned in the Tenth Schedule to Repeals

this Act shall also be repealed to the extent specified in the third column of that Schedule:

Provided that—

9 and 10 Geo. 5, c. 101 (a) nothing in this section shall affect the Preamble to the Government of India Act, 1919;

(b) without prejudice to any other provisions of this Act, to the provisions of the Government of Burma Act, 1935, and to the provisions of the Interpretation Act, 1889, relating to the effect of repeals, this repeal shall not affect any appointment made under any enactment so repealed to any office, and any such appointment shall have effect as if it were an appointment to the corresponding office under this Act or the Government of Burma Act, 1935.

The preamble to the Government of India Act has not been repealed. See notes to s. 1 of this Act. In spite of the repeal of the Government of India Act, s. 317 provides for the continuance of certain provisions of that Act with consequential amendments as set out in the Ninth Schedule, (being certain provisions of that Act relating to the Governor-General, the Commander-in-Chief, the Indian Legislature and provisions supplemental to those provisions). By s. 310, His Majesty may by Order in Council remove difficulties which may arise regarding the transition from the provisions of the old Act to the provisions of the new Act, and from the provisions of Part XIII of this Act to the provisions of Part II; and he may direct that any provisions of the old Act shall for a limited period have effect subject to such modification as may be specified.

By paragraph 12 of the Government of India (Commencement and Transitory Provisions) Order, 1936, it is provided that until the establishment of the Federation, the following portion of s. 67(2) of the old Act shall continue to be in force, and so much of s. 321 and of the Tenth Schedule as repeals it shall not have effect: 'S. 67(2)—It shall not be lawful without the previous sanction of the Governor-General to introduce at a meeting of either Chamber of the Indian Legislature any measure affecting the public debt or imposing any charge on the revenues of India.'

SCHEDULES

FIRST SCHEDULE[1]

Sections 5, 18, 308

Composition of the Federal Legislature

Part I

Representatives of British India

General Qualification for Membership

1. A person shall not be qualified to be chosen as a representative of British India to fill a seat in the Federal Legislature unless he—

(a) is a British subject, or the Ruler or a subject of an Indian State which has acceded to the Federation ; and
(b) is, in the case of a seat in the Council of State, not less than thirty years of age and, in the case of a seat in the Federal Assembly, not less than twenty-five years of age ; and
(c) possesses such, if any, of the other qualifications specified in, or prescribed under, this Part of this Schedule as may be appropriate in his case :

Provided that the Ruler or a subject of an Indian State which has not acceded to the Federation—

(i) shall not be disqualified under sub-paragraph (a) of this paragraph to fill a seat allocated to a Province if he would be eligible to be elected to the Legislative Assembly of that Province ; and
(ii) in such cases as may be prescribed, shall not be disqualified under the said sub-paragraph (a) to fill a seat allocated to a Chief Commissioner's Province.

2. Upon the expiration of the term for which he is chosen to serve as a member of the Federal Legislature, a person, if otherwise duly qualified, shall be eligible to be chosen to serve for a further term.

The Council of State

3. Of the one hundred and fifty-six seats in the Council of State to be filled by representatives of British India one hundred and fifty seats shall be allocated to the Governors' Provinces, the Chief Commissioners' Provinces and the Anglo-Indian, European and Indian Christian communities in the manner shown in division (i) of the relevant Table of Seats appended to this Part of this Schedule,

[1] See (Scheduled Castes) Order, 1936 and (Federal Legislature Amendment) Order, 1936.

and six seats shall be filled by persons chosen by the Governor-General in his discretion.

4. To each Governor's Province, Chief Commissioner's Province and community specified in the first column of division (i) of the Table there shall be allotted the number of seats specified in the second column opposite to that Province or community, and of the seats so allotted to a Governor's Province or a Chief Commissioner's Province, the number specified in the third column shall be general seats, the number specified in the fourth column shall be seats for representatives of the scheduled castes, the number specified in the fifth column shall be Sikh seats, the number specified in the sixth column shall be Muhammadan seats, and the number specified in the seventh column shall be seats reserved for women.

5. A Governor's Province or a Chief Commissioner's Province, exclusive of any portion thereof which His Majesty in Council may deem unsuitable for inclusion in any constituency or in any constituency of any particular class, shall be divided into territorial constituencies—

(*a*) for the election of persons to fill the general seats, if any;

(*b*) for the election of persons to fill the Sikh seats, if any; and

(*c*) for the election of persons to fill the Muhammadan seats, if any,

or, if as respects any class of constituency it is so prescribed, may form one territorial constituency.

To each territorial constituency of any class one or more seats of that class shall be assigned.

6.—(1) No person shall be entitled to vote at an election to fill a Sikh seat or a Muhammadan seat in the Council of State unless he is a Sikh or a Muhammadan, as the case may be.

(2) No person who is, or is entitled to be, included in the electoral roll for a territorial constituency in any Province for the election of persons to fill a Sikh seat or a Muhammadan seat in the Council of State shall be entitled to vote at an election to fill a general seat therein allotted to that Province.

(3) No Anglo-Indian, European or Indian Christian shall be entitled to vote at an election to fill a general seat in the Council of State.

(4) Subject as aforesaid, the qualifications entitling persons to vote in territorial constituencies at elections of members of the Council of State shall be such as may be prescribed.

7. Nothing in the two last preceding paragraphs shall apply in relation to British Baluchistan, and a person to fill the seat in the Council of State allotted to that Province shall be chosen in such manner as may be prescribed.

8. In any Province to which a seat to be filled by a representative of the scheduled castes is allotted, a person to fill that seat

shall be chosen by the members of those castes who hold seats in the Chamber or, as the case may be, either Chamber of the Legislature of that Province.

9. In any Province to which a seat reserved for women is allotted, a woman to fill that seat shall be chosen by the persons, whether men or women, who hold seats in the Chamber or, as the case may be, the Chambers of the Legislature of that Province.

10. Persons to fill the seats allotted to the Anglo-Indian, European and Indian Christian communities shall be chosen by the members of Electoral Colleges consisting of such Anglo-Indians, Europeans and Indian Christians, as the case may be, as are members of the Legislative Council of any Governor's Province or of the Legislative Assembly of any Governor's Province.

The Rules regulating the conduct of elections by the European Electoral College shall be such as to secure that on any occasion where more than one seat falls to be filled by the College no two of the seats to be then filled shall be filled by persons who are normally resident in the same Province.

11. A person shall not be qualified to hold a seat in the Council of State unless—

(*a*) in the case of a seat allotted to a Governor's Province or a Chief Commissioner's Province, he is qualified to vote in a territorial constituency in the Province at an election of a member of the Council of State, or, in the case of a seat allotted to British Baluchistan, possesses such qualifications as may be prescribed ;

(*b*) in the case of a seat allotted to the Anglo-Indian, the European or the Indian Christian community, he possesses such qualifications as may be prescribed.

12. Subject to the provisions of the four next succeeding paragraphs, the term of office of a member of the Council of State shall be nine years:

Provided that a person chosen to fill a casual vacancy shall be chosen to serve only for the remainder of his predecessor's term of office.

13. Upon the first constitution of the Council of State persons shall be chosen to fill all the seats allotted to Governors' Provinces, Chief Commissioners' Provinces and communities, but, for the purpose of securing that in every third year one-third of the holders of such seats shall retire, one-third of the persons first chosen shall be chosen to serve for three years only, one-third shall be chosen to serve for six years only and one-third shall be chosen to serve for nine years, and thereafter in every third year persons shall be chosen to fill for nine years the seats then becoming vacant in consequence of the provisions of this paragraph.

14. In the case of a Province specified in column one in division (ii) of the Table of Seats, the numbers specified as respects seats of different classes in columns two to six, in columns seven to eleven

and in columns twelve to sixteen respectively shall be the numbers of the seats of the different classes to be filled upon the first constitution of the Council by members chosen to serve for three years only, by members chosen to serve for six years only, and by members chosen to serve for nine years.

15. The person chosen upon the first constitution of the Council to fill the Anglo-Indian seat shall be chosen to serve for nine years; of the seven persons then chosen to fill the European seats, three shall be chosen to serve for three years only, one shall be chosen to serve for six years only and three shall be chosen to serve for nine years; and, of the two persons then chosen to fill the Indian Christian seats, one shall be chosen to serve for three years only and one shall be chosen to serve for nine years.

16. Upon the first constitution of the Council of State two of the persons to be chosen by the Governor-General shall be chosen to serve for three years only, two shall be chosen to serve for six years only and two shall be chosen to serve for nine years.

The Federal Assembly

17. The allocation of seats in the Federal Assembly, other than seats allotted to Indian States, shall be as shown in the relevant Table of Seats appended to this Part of this Schedule.

18. To each Governor's Province and Chief Commissioner's Province specified in the first column of the Table there shall be allotted the number of seats specified in the second column opposite to that Province, and of those seats—

(i) the number specified in the third column shall be general seats, of which the number specified in the fourth column shall be reserved for members of the scheduled castes;

(ii) the numbers specified in the next eight columns shall be the numbers of seats to be filled respectively by persons chosen to represent (*a*) the Sikh community; (*b*) the Muhammadan community; (*c*) the Anglo-Indian community; (*d*) the European community; (*e*) the Indian Christian community; (*f*) the interests of commerce and industry; (*g*) landholders; and (*h*) the interests of labour; and

(iii) the number specified in the thirteenth column shall be the number of seats reserved to women.

There shall also be in the Federal Assembly four seats not allotted to any Province, of which three shall be seats to be filled by representatives of commerce and industry and one shall be a seat to be filled by a representative of labour.

19. Subject to the provisions of the next succeeding paragraph, persons to fill the seats in the Federal Assembly allotted to a Governor's Province as general seats, Sikh seats or Muhammadan

seats shall be chosen by electorates consisting of such of the members of the Legislative Assembly of the Province as hold therein general seats, Sikh seats or Muhammadan seats respectively, voting in the case of a general election in accordance with the principle of proportional representation by means of the single transferable vote :

Provided that in the North-West Frontier Province the holders of Sikh seats, and in any Province in which seats are reserved for representatives of backward areas or backward tribes the holders of those seats, shall, for the purposes of this paragraph, be deemed to hold general seats.

20. The provisions of this paragraph shall have effect with respect to the general seats reserved in any Governor's Province for members of the scheduled castes :—

For the purposes of a general election of members of the Federal Assembly,—

(a) there shall be a primary electorate consisting of all persons who were successful candidates at the primary elections held, in accordance with the provisions of the Fifth Schedule to this Act, on the occasion of the last general election of members of the Legislative Assembly of the Province for the purpose of selecting candidates for seats reserved for members of the scheduled castes ;

(b) the members of the primary electorate so constituted shall be entitled to take part in a primary election held for the purpose of electing four candidates for each seat so reserved ; and

(c) no person who is not so elected as a candidate shall be qualified to be chosen to fill such a seat.

Rules made under this Part of this Schedule shall make provision as to the manner in which a casual vacancy occurring in a seat to which this paragraph applies is to be filled.

21. For the purpose of choosing persons to fill the women's seats in the Federal Assembly there shall be for British India an electoral college consisting of such women as are members of the Legislative Assembly of any Governor's Province, and the person to fill a woman's seat allotted to any particular Province shall be chosen by the members of the college.

Rules regulating the conduct of elections by the women's electoral college shall be such as to secure that, of the nine women's seats allotted to Provinces, at least two are held by Muhammadans and at least one by an Indian Christian.

22. For the purpose of choosing persons to fill the Anglo-Indian, European and Indian Christian seats in the Federal Assembly, there shall be for British India three electoral colleges consisting respectively of such persons as hold an Anglo-Indian, a European or an Indian Christian seat in the Legislative Assembly of any Governor's Province, and the person to fill an Anglo-Indian, European or Indian Christian seat allotted to any particular Province shall be chosen by the members of the appropriate electoral college.

In choosing at a general election the persons to fill the Indian Christian seats allotted to the Province of Madras, the Indian Christian electoral college shall vote in accordance with the principle of proportional representation by means of the single transferable vote.

23. Persons to fill the seats in the Federal Assembly which are to be filled by representatives of commerce and industry, landholders and representatives of labour shall be chosen—

(*a*) in the case of a seat allotted to a Province which is to be filled by a representative of commerce and industry, by such chambers of commerce and similar associations voting in such manner as may be prescribed;

(*b*) in the case of a seat allotted to a Province which is to be filled by a landholder, by such persons voting in such territorial constituencies and in such manner as may be prescribed;

(*c*) in the case of a seat allotted to a Province which is to be filled by a representative of labour, by such organisations, or in such constituencies, and in accordance with such manner of voting as may be prescribed;

(*d*) in the case of one of the non-provincial seats which are to be filled by representatives of commerce and industry, by such Associated Chambers of Commerce, in the case of another such seat by such Federated Chambers of Commerce and in the case of the third such seat by such commercial bodies in Northern India, voting in each case in such manner as may be prescribed; and

(*e*) in the case of the non-provincial seat which is to be filled by a representative of labour, by such organisations voting in such manner as may be prescribed.

24. Persons to fill the seats in the Federal Assembly allotted to Chief Commissioners' Provinces as general seats or Muhammadan seats shall be chosen—

(*a*) in the case of Coorg, by the members of the Legislative Council; and

(*b*) in other cases in such manner as may be prescribed.

25. A person shall not be qualified to hold a seat in the Federal Assembly, unless—

(i) in the case of a general seat, a Sikh seat, a Muhammadan seat, an Anglo-Indian seat, a European seat, an Indian Christian seat or a woman's seat allotted to a Governor's Province or the Province of Coorg, he is qualified to hold a seat of the same class in the Legislative Assembly, or, in the case of Coorg, the Legislative Council, of that Province;

(ii) in the case of any other seat, he possesses such qualifications as may be prescribed.

General

26.—(1) In the foregoing provisions of this Schedule the following expressions have the meanings hereby assigned to them, that is to say :—

'a European' means a person whose father or any of whose other male progenitors in the male line is or was of European descent and who is not a native of India ;

'an Anglo-Indian' means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is a native of India ;

'an Indian Christian' means a person who professes any form of the Christian religion and is not a European or an Anglo-Indian ;

'the scheduled castes' means such castes, races or tribes or parts of or groups within castes, races or tribes, being castes, races, tribes, parts or groups which appear to His Majesty in Council to correspond to the classes of persons formerly known as 'the depressed classes', as His Majesty in Council may specify ;[1] and

'prescribed' means prescribed by His Majesty in Council or, so far as regards any matter which under this Act the Federal Legislature or the Governor-General are competent to regulate, prescribed by an Act of that Legislature or by a rule made under the next succeeding paragraph.

(2) In this paragraph the expression 'native of India' has the same meaning as it had for the purposes of section six of the Government of India Act, 1870, and accordingly it includes any person born and domiciled within the dominions of His Majesty in India or Burma of parents habitually resident in India or Burma and not established there for temporary purposes only. 33 and 34 Vict. c. 3

27. In so far as provision with respect to any matter is not made by this Act or by His Majesty in Council or, after the constitution of the Federal Legislature, by Act of that Legislature (where the matter is one with respect to which that Legislature is competent to make laws), the Governor General, exercising his individual judgment, may make rules for carrying into effect the foregoing provisions of this part of this Schedule and for securing the due constitution of the Council of State and the Federal Assembly and, in particular, but without prejudice to the generality of the foregoing words, with respect to—

(i) the notification of vacancies, including casual vacancies and the proceedings to be taken for filling vacancies ;
(ii) the nomination of candidates ;
(iii) the conduct of elections, including the application to elections of the principle of proportional representation

1 See the Government of India (Scheduled Castes) Order, 1936, by which certain castes, races and tribes are to be deemed to be Scheduled castes.

by means of the single transferable vote, and the rules to regulate elections where certain of the seats to be filled are to be filled by persons to be chosen to serve for different terms, or are reserved for members of the scheduled castes ;

(iv) the expenses of candidates at elections ;

(v) corrupt practices and other offences at or in connection with elections ;

(vi) the decision of doubts and disputes arising out of or in connection with the choice of persons to fill seats in the Council of State or the Federal Assembly ; and

(vii) the manner in which rules are to be carried into effect.

TABLE OF SEATS

The Council of State

Representatives of British India

(i) *Allocation of seats*

1 Province or Community	2 Total seats	3 General seats	4 Seats for Scheduled Castes	5 Sikh seats	6 Muhammadan seats	7 Women's seats
Madras ..	20	14	1	—	4	1
Bombay ..	16	10	1	—	4	1
Bengal ..	20	8	1	—	10	1
United Provinces ..	20	11	1	—	7	1
Punjab ..	16	3	—	4	8	1
Bihar ..	16	10	1	—	4	1
Central Provinces and Berar ..	8	6	1	—	1	—
Assam ..	5	3	—	—	2	—
North-West Frontier Province ..	5	1	—	—	4	—
Orissa ..	5	4	—	—	1	—
Sind ..	5	2	—	—	3	—
British Baluchistan	1	—	—	—	1	—
Delhi ..	1	1	—	—	—	—
Ajmer-Merwara ..	1	1	—	—	—	—
Coorg ..	1	1	—	—	—	—
Anglo-Indians ..	1	—	—	—	—	—
Europeans ..	7	—	—	—	—	—
Indian Christians ..	2	—	—	—	—	—
TOTALS ..	150	75	6	4	49	6

(ii) Distribution of seats for purposes of triennial elections

1	Number of seats to be filled originally for three years only					Number of seats to be filled originally for six years only					Number of seats to be filled originally for nine years				
	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Province	General Seats	Seats for Scheduled castes	Sikh Seats	Muhammadan Seats	Women's Seats	General Seats	Seats for Scheduled castes	Sikh Seats	Muhammadan Seats	Women's Seats	General Seats	Seats for Scheduled castes	Sikh Seats	Muhammadan Seats	Women's Seats
Madras	—	—	—	—	—	7	—	—	2	1	7	1	—	2	—
Bombay	5	—	—	2	1	—	—	—	—	—	5	1	—	2	—
Bengal	4	1	—	5	—	—	—	—	—	—	4	—	—	5	1
United Provinces	5	1	—	3	1	6	—	—	4	—	—	—	—	—	—
Punjab	2	—	2	4	—	1	—	2	4	1	—	—	—	—	—
Bihar	—	—	—	—	—	5	1	—	2	—	5	—	—	2	1
Central Provinces and Berar ..	—	—	—	—	—	6	1	—	1	—	—	—	—	—	—
Assam	—	—	—	—	—	3	—	—	2	—	—	—	—	—	—
North-West Frontier Province ..	—	—	—	—	—	—	—	—	—	—	1	—	—	4	—
Orissa	4	—	—	1	—	—	—	—	—	—	—	—	—	—	—
Sind	2	—	—	3	—	—	—	—	—	—	—	—	—	—	—
British Baluchistan	—	—	—	—	—	—	—	—	—	—	—	—	—	1	—
Delhi	—	—	—	—	—	—	—	—	—	—	1	—	—	—	—
Ajmer-Merwara	—	—	—	—	—	—	—	—	—	—	1	—	—	—	—
Coorg	—	—	—	—	—	—	—	—	—	—	1	—	—	—	—
TOTALS ..	22	2	2	18	2	28	2	2	15	2	25	2	—	16	2

Table of Seats

The Federal Assembly

Representatives of British India

1	2	3	4	5	6	7	8	9	10	11	12	13
		General Seats :—										
Province	Total Seats	Total of General Seats	General seats reserved for Scheduled castes	Sikh Seats	Muhammadan Seats	Anglo-Indian Seats	European Seats	Indian Christian Seats	Seats for representatives of commerce and industry	Landholders' Seats	Seats for representatives of labour	Women's Seats
Madras	37	19	4	—	8	1	1	2	2	1	1	2
Bombay	30	13	2	—	6	1	1	1	3	1	2	2
Bengal	37	10	3	—	17	1	1	1	3	1	2	1
United Provinces ..	37	19	3	—	12	1	1	1	—	1	1	1
Punjab	30	6	1	6	14	—	1	1	—	1	—	1
Bihar	30	16	2	—	9	—	1	1	—	1	1	1
Central Provinces and Berar ..	15	9	2	—	3	—	—	—	—	1	1	1
Assam	10	4	1	—	3	—	1	1	—	—	1	—
North-West Frontier Province ..	5	1	—	—	4	—	—	—	—	—	—	—
Orissa	5	4	1	—	1	—	—	—	—	—	—	—
Sind	5	1	—	—	3	—	1	—	—	—	—	—
British Baluchistan ..	1	—	—	—	1	—	—	—	—	—	—	—
Delhi	2	1	—	—	1	—	—	—	—	—	—	—
Ajmer-Merwara	1	1	—	—	—	—	—	—	—	—	—	—
Coorg	1	1	—	—	—	—	—	—	—	—	—	—
Non-Provincial Seats ..	4	—	—	—	—	—	—	—	3	—	1	—
TOTALS ..	250	105	19	6	82	4	8	8	11	7	10	9

Part II

Representatives of Indian States

1. The allocation to Indian States of seats in the Federal Legislature shall be as shown in the Table appended to this Part of this Schedule, hereinafter referred to as the 'Table of Seats', and persons to represent Indian States in that Legislature shall be chosen and appointed in accordance with the provisions hereinafter contained.

2. In the case of the Council of State, there shall be allotted to each State or, as the case may be, to each group of States specified in the first column of the Table of Seats, the number of seats specified in the second column of the said Table opposite to that State or to that group of States.

3. In the case of the Federal Assembly, there shall be allotted to each State or, as the case may be, to each group of States specified in the third column of the Table of Seats, the number of seats specified in the fourth column of the said Table opposite to that State or to that group of States.

4. A person shall not be qualified to be appointed under this Part of this Schedule to fill a seat in either Chamber of the Federal Legislature unless he—

(i) is a British subject or the Ruler or a subject of an Indian State which has acceded to the Federation ; and

(ii) is, in the case of a seat in the Council of State, not less than thirty years of age and, in the case of a seat in the Federal Assembly, not less than twenty-five years of age :

Provided that—

(*a*) the Governor-General may in his discretion declare as respects any State, the Ruler of which at the date of the establishment of the Federation was by reason of his minority not exercising ruling powers, that sub-paragraph (i) of this paragraph shall not apply to any named subject, or to subjects generally, of that State until that State comes under the rule of a Ruler who is of an age to exercise ruling powers ; and

(*b*) sub-paragraph (ii) of this paragraph shall not apply to a Ruler who is exercising ruling powers.

5. Upon the expiration of the term for which he is appointed to serve as a member of the Federal Legislature, a person, if otherwise duly qualified, shall be eligible to be appointed to serve for a further term.

6. Subject to the special provisions hereinafter contained with respect to the appointment of persons to represent certain States and groups of States comprised in Divisions XVI and XVII of the Table of Seats,—

(i) the Rulers of States constituting a group of States to which a seat in the Council of State is allotted shall in rotation appoint a person to fill that seat; and

(ii) the Rulers of the States constituting a group of States to which a seat in the Federal Assembly is allotted shall appoint jointly a person to fill that seat:

Provided that the Rulers of two or more States entitled to appoint in rotation a person to fill a seat in the Council of State allotted to a group of States may by agreement, and with the approval of the Governor-General in his discretion, appoint jointly a person to fill that seat.

7. The period for which a person shall be appointed to fill a seat shall be—

(i) in the case of a person appointed to fill a seat in the Council of State—

(*a*) by the Ruler of a State entitled to separate representation, nine years;

(*b*) jointly by the Rulers of all the States in a group which have acceded to the Federation, three years;

(*c*) by the Ruler of a State appointing in rotation, one year subject, however, to the special provisions of the next succeeding paragraph with respect to certain States therein mentioned;

(*d*) jointly by Rulers of some only of the States in a group which have acceded to the Federation, a period equal to the aggregate of the periods for which each of them might in rotation have appointed a person to hold that seat or three years, whichever may be the shorter period;

(*e*) in any other manner, three years; and

(ii) in the case of a person appointed to fill a seat in the Federal Assembly, until the dissolution of the Assembly:

Provided that—

(i) a person appointed to fill a seat upon the occurrence of a casual vacancy shall be appointed to fill that seat for the remainder of the period for which his predecessor was appointed:

(ii) in the case of first appointments to fill seats in the Council of State the Governor-General in his discretion shall make by order provision for securing that approximately one-third of the persons appointed by Rulers entitled to separate representation shall be appointed to fill seats for three years only, approximately one-third to fill seats for six years only and approximately one-third to fill seats for nine years.

8. The Ruler of a State mentioned in this paragraph when appointing in rotation a person to fill a seat in the Council of State shall, notwithstanding anything in the preceding paragraph, be entitled to appoint that person to fill the seat—

(*a*) in the case of the Rulers of Panna and of Mayurbhanj, for two years ; and

(*b*) in the case of the Ruler of Pudukkottai, for three years.

9. Subject as hereinafter provided, the Rulers of two or more States forming a group to which one seat in either Chamber of the Federal Legislature is allotted shall, in choosing a person to be appointed by them jointly to fill that seat, each have one vote, and in the case of an equality of votes the choice shall be determined by lot or otherwise in such other manner as may be prescribed :

Provided that in choosing a person to be so appointed the Ruler of a State mentioned in sub-paragraph (*a*) of the preceding paragraph shall be entitled to two votes and the Ruler of the State mentioned in sub-paragraph (*b*) of that paragraph shall be entitled to three votes.

10. A seat in either Chamber allotted to a single State shall remain unfilled until the Ruler of that State has acceded to the Federation, and a seat in either Chamber which is the only seat therein allotted to a group of States shall remain unfilled until the Rulers of at least one-half of those States have so acceded but, subject as hereinafter provided, so long as one-tenth of the seats in either Chamber allotted either to single States or to groups of States remain unfilled by reason of the non-accession of a State or States, whether such non-accession be due to the minority of a Ruler or to any other cause, the persons appointed by the Rulers of States to fill seats in that Chamber may from time to time in the prescribed manner appoint persons, not exceeding one-half of the number of seats so unfilled to be additional members of that Chamber :

Provided that the right to appoint such additional members shall not be exercised after the expiration of twenty years from the establishment of the Federation.

A person appointed under this paragraph as an additional member of either Chamber shall be appointed to fill his seat for a period of one year only.

11. Persons to fill the seats in the Federal Assembly allotted to any group of States mentioned in Division XVI of the Table of Seats as entitled to appoint persons to fill three such seats shall be appointed in the prescribed manner by the Rulers of such of the States in the group as have acceded to the Federation :

Provided that—

(*a*) until the Rulers of two of those States have so acceded, all the three seats shall remain unfilled ; and

(*b*) until the Rulers of four of those States have so acceded, two of the three seats shall remain unfilled ; and

(c) until the Rulers of six of those States have so acceded, one of the three seats shall remain unfilled.

Seats in the Federal Assembly remaining unfilled by reason of the provisions of this paragraph shall be treated as seats remaining unfilled for the purposes of the last preceding paragraph.

12. The provisions of this paragraph shall apply with respect to the two seats in the Council of State and the five seats in the Federal Assembly allotted to the States comprised in Division XVII of the Table of Seats :—

(a) the States in question are such States, being States which on the first day of January, nineteen hundred and thirty-five, were included in the Western India States Agency, the Gujarat States Agency, the Deccan States Agency, the Eastern States Agency, the Central India Agency or the Rajputana Agency, or were in political relations with the Government of the Punjab or the Government of Assam, as may be enumerated in rules made by the Governor-General in his discretion ;

(b) the Governor-General shall, in the rules so made by him, divide the said States into five groups, and of the five seats in the Federal Assembly allotted to those States one shall be deemed to be allotted to each of the groups ;

(c) a seat in the Federal Assembly allotted to one of the said groups shall remain unfilled until the Rulers of at least one-half of the States in the group have acceded to the Federation, but, save as aforesaid, a person to fill such a seat shall be appointed in the prescribed manner by the Rulers of such of the States in the group as have acceded to the Federation ;

(d) persons to fill the two seats in the Council of State allotted to the States comprised in the said Division shall be appointed in the prescribed manner by the persons appointed under the preceding sub-paragraph to fill seats in the Federal Assembly :

Provided that, so long as three of the five seats in the Federal Assembly remain unfilled, one of the two seats in the Council of State shall also remain unfilled ;

(e) seats in the Federal Assembly or Council of State remaining unfilled by reason of the provisions of this paragraph shall be treated as seats remaining unfilled for the purposes of the last but one preceding paragraph.

'This paragraph shall have effect as if the State of Khaniadhana had been included in the Central India Agency on the first day of January, Nineteen hundred and thirty-five.'[1]

[1] The last sub-paragraph has been added by the Government of India (Federal Legislature Amendment) Order, 1936.

13. His Majesty in Council may by order vary the Table of Seats by transferring any State from one group of States specified in column one or column three of that Table to another group of States specified in the same column, if he deems it expedient so to do—

(*a*) with a view to reducing the number of seats which by reason of the non-accession of a State or States would otherwise remain unfilled ; or

(*b*) with a view to associating in separate groups States whose rulers do, and States whose rulers do not, desire to make appointments jointly instead of in rotation,

and is satisfied that such variation will not adversely affect the rights and interest of any State :

Provided that a State mentioned in paragraph eight of this Part of this Schedule shall not be transferred to another group unless the Ruler of the State has agreed to relinquish the privileges enjoyed by him under the said paragraph and under paragraph nine.

Where an order varying the Table of Seats is made under this paragraph, references (whether express or implied) in the foregoing provisions of this Part of this Schedule to the Table shall be construed as references to the Table as so varied.

14. In so far as provision in that behalf is not made by His Majesty in Council, the Governor-General may in his discretion make rules for carrying into effect the provisions of this Part of this Schedule and in particular, but without prejudice to the generality of the foregoing words, with respect to—

(*a*) the times at which and the manner in which appointments are to be made, the order in which Rulers entitled to make appointments in rotation are to make them and the date from which appointments are to take effect ;

(*b*) the filling of casual vacancies in seats ;

(*c*) the decision of doubts or disputes arising out of or in connection with any appointment ; and

(*d*) the manner in which the rules are to be carried into effect.

In this Part of this Schedule the expression 'prescribed' means prescribed by His Majesty in Council or by rules made under this paragraph.

15. For the purposes of subsection (2) of section five of this Act—

(i) if the Rulers of at least one-half of the States included in any group to which one seat in the Council of State is allotted accede to the Federation, the Rulers so acceding shall be reckoned as being entitled together to choose one member of the Council of State ;

(ii) if, of the Rulers of States included in the groups to be formed out of the States comprised in Division XVII of the Table of Seats, sufficient accede to the Federation to entitle them to appoint one member or two members

of the Federal Assembly, the Rulers so acceding shall be reckoned as being entitled together to choose one member of the Council of State and, if sufficient accede to entitle them to appoint three or more members of the Federal Assembly, the Rulers so acceding shall be reckoned as being entitled together to choose two members of the Council of State ; and

(iii) the population of a State shall be taken to be the population attributed thereto in column five of the Table of Seats or, if it is one of the States comprised in the said Division XVII of the Table, such figure as the Governor-General may in his discretion determine, and the total population of the States shall be taken to be the total population thereof as stated at the end of the Table.

Table of Seats

The Council of State and the Federal Assembly

Representatives of Indian States

1 States and Groups of States	2 Number of seats in Council of State	3 States and Groups of States	4 Number of seats in the Federal Assembly	5 Population
		Division I		
Hyderabad ..	5	Hyderabad ..	16	14,436,148
		Division II		
Mysore ..	3	Mysore ..	7	6,557,302
		Division III		
Kashmir ..	3	Kashmir ..	4	3,646,243
		Division IV		
Gwalior ..	3	Gwalior ..	4	3,523,070
		Division V		
Baroda ..	3	Baroda ..	3	2,443,007
		Division VI		
Kalat ..	2	Kalat ..	1	342,101
		Division VII		
Sikkim ..	1	Sikkim ..	..	109,808
		Division VIII		
1. Rampur ..	1	1. Rampur ..	1	465,225
2. Benares ..	1	2. Benares ..	1	391,272

1 States and Groups of States	2 Number of seats in Council of State	3 States and Groups of States	4 Number of seats in the Federal Assembly	5 Population
		DIVISION IX		
1. Travancore	2	1. Travancore	5	5,095,973
2. Cochin	2	2. Cochin	1	1,205,016
3. Pudukkottai		3. Pudukkottai		400,694
Banganapalle	1	Banganapalle	1	39,218
Sandur		Sandur		13,583
		DIVISION X		
1. Udaipur	2	1. Udaipur	2	1,566,910
2. Jaipur	2	2. Jaipur	3	2,631,775
3. Jodhpur	2	3. Jodhpur	2	2,125,982
4. Bikaner	2	4. Bikaner	1	936,218
5. Alwar	1	5. Alwar	1	749,751
6. Kotah	1	6. Kotah	1	685,804
7. Bharatpur	1	7. Bharatpur	1	486,954
8. Tonk	1	8. Tonk	1	317,360
9. Dholpur	1	9. Dholpur	1	254,986
10. Karauli	1	Karauli		140,525
11. Bundi	1	10. Bundi	1	216,722
12. Sirohi	1	Sirohi		216,528
13. Dungarpur	1	11. Dungarpur	1	227,544
14. Banswara	1	Banswara		260,670
15. Partabgarh	1	12. Partabgarh	1	76,539
Jhalawar		Jhalawar		107,890
16. Jaisalmer	1	13. Jaisalmer	1	76,255
Kishengarh		Kishengarh		85,744
		DIVISION XI		
1. Indore	2	1. Indore	2	1,325,089
2. Bhopal	2	2. Bhopal	1	729,955
3. Rewa	2	3. Rewa	2	1,587,445
4. Datia	1	4. Datia	1	158,834
5. Orchha	1	Orchha		314,661
6. Dhar	1	5. Dhar		243,430
7. Dewas (Senior)	1	Dewas (Senior)	1	83,321
Dewas (Junior)		Dewas (Junior)		70,513
8. Jaora	1	6. Jaora	1	100,166
Ratlam		Ratlam		107,321
9. Panna		7. Panna		212,130
Samthar	1	Samthar	1	33,307
Ajaigarh		Ajaigarh		85,895
10. Bijawar		8. Bijawar		115,852
Charkhari	1	Charkhari	1	120,351
Chhatarpur		Chhatarpur		161,267
11. Baoni		9. Baoni		19,132
Nagod	1	Nagod	1	74,589
Maihar		Maihar		68,991
Baraundha		Baraundha		16,071
12. Barwani		10. Barwani		141,110
Ali Rajpur	1	Ali Rajpur	1	101,963
Shahpura		Shahpura		54,233
13. Jhabua		11. Jhabua		145,522
Sailana	1	Sailana	1	35,223
Sitamau		Sitamau		28,422
14. Rajgarh		12. Rajgarh		134,891
Narsingarh	1	Narsingarh	1	113,873
Khilchipur		Khilchipur		45,583

1 States and Groups of States	2 Number of seats in Council of State	3 States and Groups of States.	4 Number of seats in the Federal Assembly	5 Population
		DIVISION XII		
1. Cutch ..	1	1. Cutch ..	1	514,307
2. Idar	1	2. Idar ..	1	262,660
3. Nawanagar ..	1	3. Nawanagar ..	1	409,192
4. Bhavnagar ..	1	4. Bhavnagar ..	1	500,274
5. Junagadh ..	1	5. Junagadh ..	1	545,152
6. Rajpipla ..	1	6. Rajpipla ..	1	206,114
Palanpur ..		Palanpur ..		264,179
7. Dhrangadhra ..	1	7. Dhrangadhra	1	88,961
Gondal ..		Gondal ..		205,846
8. Porbandar ..	1	8. Porbandar ..	1	115,673
Morvi ..		Morvi ..		113,023
9. Radhanpur ..	1	9. Radhanpur ..	1	70,530
Wankaner ..		Wankaner ..		44,259
Palitana ..		Palitana ..		62,150
10. Cambay ..	1	10. Cambay ..	1	87,761
Dharampur ..		Dharampur..		112,031
Balasinor ..		Balasinor ..		52,525
11. Baria ..	1	11. Baria ..	1	159,429
Chhota Udepur ..		Chhota Udepur		144,640
Sant ..		Sant ..		83,531
Lunawada ..		Lunawada ..		95,162
12. Bansda ..	1	12. Bansda ..	1	48,839
Sachin ..		Sachin ..		22,107
Jawhar ..		Jawhar ..		57,261
Danta ..		Danta ..		26,196
13. Dhrol ..	1	Dhrol ..		27,639
Limbdi ..		Limbdi ..		40,088
Wadhwan ..		Wadhwan ..		42,602
Rajkot ..		Rajkot ..		75,540
		DIVISION XIII		
1. Kolhapur ..	2	1. Kolhapur ..	1	957,137
2. Sangli ..	1	2. Sangli ..	1	258,442
Savantvadi ..		Savantvadi ..		230,589
3. Janjira ..	1	3. Janjira ..	1	110,379
Mudhol ..		Mudhol ..		62,832
Bhor ..		Bhor ..		141,546
4. Jamkhandi ..	1	4. Jamkhandi ..	1	114,270
Miraj (Senior) ..		Miraj (Senior)		93,938
Miraj (Junior) ..		Miraj (Junior)		40,684
Kurundwad (Senior) ..		Kurundwad (Senior) ..		44,204
Kurundwad (Junior) ..		Kurundwad (Junior) ..		39,583
5. Akalkot ..	1	5. Akalkot ..	1	92,605
Phaltan ..		Phalan ..		58,761
Jath ..		Jath ..		91,099
Aundh ..		Aundh ..		76,507
Ramdurg ..		Ramdurg ..		35,454

1 States and Groups of States	2 Number of seats in Council of State	3 States and Groups of States	4 Number of seats in the Federal Assembly	5 Population
		DIVISION XIV		
1. Patiala ..	2	1. Patiala ..	2	1,625,520
2. Bahawalpur ..	2	2. Bahawalpur ..	1	984,612
3. Khairpur ..	1	3. Khairpur ..	1	227,183
4. Kapurthala ..	1	4. Kapurthala ..	1	316,757
5. Jind	1	5. Jind ..	1	324,676
6. Nabha ..	1	6. Nabha ..	1	287,574
		7. Tehri-Garhwal	1	349,573
7. Mandi ..		8. Mandi ..		207,465
Bilaspur ..	1	Bilaspur ..	1	100,994
Suket ..		Suket ..		58,408
8. Tehri-Garhwal ..				
Sirmur ..	1	9. Sirmur ..	1	148,568
Chamba ..		Chamba ..		146,870
9. Faridkot ..		10. Faridkot ..		164,364
Malerkotla ..	1	Malerkotla ..	1	83,072
Loharu ..		Loharu ..		23,338
		DIVISION XV		
1. Cooch Behar ..	1	1. Cooch Behar ..	1	590,886
2. Tripura ..	1	2. Tripura ..	1	382,450
Manipur ..		3. Manipur ..	1	445,606
		DIVISION XVI		
1. Mayurbhanj ..	1	1. Mayurbhanj ..	1	889,603
Sonepur ..		2. Sonepur ..	1	237,920
2. Patna ..	1	3. Patna ..	1	566,924
Kalahandi ..		4. Kalahandi	1	513,716
3. Keonjhar ..		5. Keonjhar	1	460,609
Dhenkanal ..		6. Gangpur ..	1	356,674
Nayagarh ..	1	7. Bastar ..	1	524,721
Talcher ..		8. Surguja ..	1	501,939
Nilgiri ..				
4. Gangpur ..		9. Dhenkanal ..		284,326
Bamra ..		Nayagarh ..		142,406
Seraikela ..	1	Seraikela ..		143,525
Baud ..		Baud ..		135,248
Bonai ..		Talcher ..	3	69,702
5. Bastar ..		Bonai ..		80,186
Surguja ..	1	Nilgiri ..		68,594
Raigarh ..		Bamra ..		151,047
Nandgaon ..				
		10. Raigarh ..		277,569
6. Khairagarh ..		Khairagarh ..		157,400
Jashpur ..		Jashpur ..		193,698
Kanker ..	1	Kanker ..	3	136,101
Korea ..		Sarangarh ..		128,967
Sarangarh ..		Korea ..		90,886
		Nandgaon ..		182,380

1 States and Groups of States	2 Number of seats in Council of State	3 States and Groups of States	4 Number of seats in the Federal Assembly	5 Population
	Division XVII			
States not mentioned in any of the preceding Divisions, but described in paragraph 12 of this Part of this Schedule.	2	States not mentioned in any of the preceding Divisions, but described in paragraph 12 of this Part of this Schedule.	5	3,047,129[1]
Total population of the States in this Table ..			..	78,996,844[1]

Section 6

SECOND SCHEDULE

Provisions of this Act which may be amended without affecting the Accession of a State

Part I, in so far as it relates to the Commander-in-Chief.

Part II, chapter II, save with respect to the exercise by the Governor-General on behalf of His Majesty of the executive authority of the Federation, and the definition of the functions of the Governor-General; the executive authority of the Federation; the functions of the council of ministers, and the choosing and summoning of ministers and their tenure of office; the power of the Governor-General to decide whether he is entitled to act in his discretion or exercise his individual judgment; the functions of the Governor-General with respect to external affairs and defence; the special responsibilities of the Governor-General relating to the peace or tranquillity of India or any part thereof, the financial stability and credit of the Federal Government, the rights of Indian States

[1] These two corrections in the figures have been made by paragraph 3 of the Government of India (Federal Legislature Amendment) Order, 1936.

and the rights and dignity of their Rulers, and the discharge of his functions by or under the Act in his discretion or in the exercise of his individual judgment; His Majesty's Instrument of Instructions to the Governor-General; the superintendence of the Secretary of State; and the making of rules by the Governor-General in his discretion for the transaction of, and the securing of transmission to him of information with respect to, the business of the Federal Government.

Part II, chapter III, save with respect to the number of the representatives of British India and of the Indian States in the Council of State and the Federal Assembly and the manner in which the representatives of the Indian States are to be chosen; the disqualifications for membership of a Chamber of the Federal Legislature in relation to the representatives of the States; the procedure for the introduction and passing of Bills; joint sittings of the two Chambers; the assent to Bills, or the withholding assent from Bills, by the Governor-General; the reservation of Bills for the signification of His Majesty's pleasure; the annual financial statement; the charging on the revenues of the Federation of the salaries allowances and pensions payable to or in respect of judges of the Federal Court, of expenditure for the purpose of the discharge by the Governor-General of his functions with respect to external affairs, defence, and the administration of any territory in the direction and control of which he is required to act in his discretion and of the sums payable to His Majesty in respect of the expenses incurred in discharging the functions of the Crown in its relations with Indian States; the procedure with respect to estimates and demands for grants; supplementary financial statements; the making of rules by the Governor-General for regulating the procedure of, and the conduct of business in, the Legislature in relation to matters where

	he acts in his discretion or exercises his individual judgment, and for prohibiting the discussion of, or the asking of questions on, any matter connected with or the personal conduct of the Ruler or ruling family of any Indian State; the making of rules by the Governor-General as to the procedure with respect to joint sittings of, and communications between, the two chambers and the protection of judges of the Federal Court and State High Courts from discussion in the Legislature of their conduct.
Part II, chapter IV,	save with respect to the power of the Governor-General to promulgate ordinances in his discretion or in the exercise of his individual judgment, or to enact Governor-General's Acts.
Part III, chapter I.	The whole chapter.
,, chapter II,	save with respect to the special responsibilities of the Governor relating to the rights of Indian States and the rights and dignity of the Rulers thereof and to the execution of orders or directions of the Governor-General, and the superintendence of the Governor-General in relation to those responsibilities.
,, chapter III,	save with respect to the making of rules by the Governor for prohibiting the discussion of, or the asking of questions on, any matter connected with or the personal conduct of the Ruler or ruling family of any Indian State, and the protection of judges of the Federal Court and State High Courts from discussion in the Legislature of their conduct.
,, chapter IV.	The whole chapter.
,, chapter V.	,,
,, chapter VI.	,,
Part IV.	The whole Part.
Part V, chapter I,	save with respect to the power of the Federal Legislature to make laws for a State; the power of the Governor-General to empower either the Federal Legislature or Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act; any power of a State to repeal a Federal law,

	and the effect of inconsistencies between a Federal law and a State law.
Part V, chapter II,	save with respect to the previous sanction of the Governor-General to the introduction or moving of any Bill or amendment affecting matters as respects which the Governor-General is required to act in his discretion; the power of Parliament to legislate for British India or any part thereof, or the restrictions on the power of the Federal Legislature and of Provincial Legislatures to make laws on certain matters.
„ chapter III.	The whole chapter.
Part VI,	save in so far as the provisions of that Part relate to Indian States, or empower the Governor-General to issue orders to the Governor of a Province for preventing any grave menace to the peace or tranquillity of India or any part thereof.
Part VII, chapter I,	in so far as it relates to Burma.
„ chapter II,	save with respect to loans and guarantees to Federated States and the appointment, removal and conditions of service of the Auditor-General.
„ chapter III,	save in so far as it affects suits against the Federation by a Federated State.
Part VIII,	save with respect to the constitution and functions of the Federal Railway Authority; the conduct of business between the Authority and the Federal Government, and the Railway Tribunal and any matter with respect to which it has jurisdiction.
Part IX, chapter I,	in so far as it relates to appeals to the Federal Court from High Courts in British India; the power of the Federal Legislature to confer further powers upon the Federal Court for the purpose of enabling it more effectively to exercise the powers conferred upon it by this Act.
„ chapter II.	The whole chapter.
Part X,	save with respect to the eligibility of Rulers and subjects of Federated States for civil Federal office.
Part XI.	The whole Part.
Part XII,	save with respect to the saving for rights and obligations of the Crown in its

	relations with Indian States; the use of His Majesty's forces in connection with the discharge of the functions of the Crown in its said relations; the limitation in relation to Federated States of His Majesty's power to adapt and modify existing Indian laws; His Majesty's powers and jurisdiction in Federated States, and resolutions of the Federal Legislature or any Provincial Legislature recommending amendments of this Act or Orders in Council made thereunder; and save also the provisions relating to the interpretation of this Act so far as they apply to provisions of this Act which may not be amended without affecting the accession of a State.
Part XIII.	The whole Part.
First Schedule.	The whole Schedule, except Part II thereof.
Third Schedule.	The whole Schedule.
Fourth Schedule,	save with respect to the oath or affirmation to be taken or made by the Ruler or subject of an Indian State.
Fifth Schedule.	The whole Schedule.
Sixth Schedule.	,,
Seventh Schedule.	Any entry in the Legislative Lists in so far as the matters to which it relates have not been accepted by the State in question as matters with respect to which the Federal Legislature may make laws for that State.
Eighth Schedule.	The whole Schedule.
Ninth Schedule.	,,
Tenth Schedule.	,,

Sections 7, 48

THIRD SCHEDULE[1]

PROVISIONS AS TO GOVERNOR-GENERAL AND GOVERNORS OF PROVINCES

1. There shall be paid to the Governor-General and to the Governors of the Provinces the following annual salaries, that is to say :—

The Governor-General .. .. 250,800 rupees.

[1] See (Governor's Allowances and Privileges) Order, 1936 and the India and Burma (Transitory Provisions) Order, 1937.

The Governor of Madras	120,000 rupees.
The Governor of Bombay	
The Governor of Bengal	
The Governor of the United Provinces	
The Governor of the Punjab ..	100,000 rupees.
The Governor of Bihar	
The Governor of the Central Provinces and Berar	72,000 rupees.
The Governor of Assam	66,000 rupees.
The Governor of the North-West Frontier Province	
The Governor of Orissa	
The Governor of Sind	

2. There shall be paid to the Governor-General and to the Governors such allowances for expenses in respect of equipment and travelling upon appointment and such allowances during their terms of office as may from time to time be fixed by His Majesty in Council, and such provision shall be made for enabling the Governor-General and the Governors to discharge conveniently and with dignity the duties of their offices as may be determined by His Majesty in Council.

3. While the Governor-General or a Governor is absent on leave, he shall in lieu of his salary be entitled to such leave allowance as may be fixed by His Majesty in Council.

4. There shall be granted to and in respect of the Governor-General and the Governor of every Province such customs privileges as may be specified by Order in Council.

5. While any person appointed by His Majesty to act as Governor-General or as a Governor is so acting, he shall be entitled to the same salary and, save as may be otherwise provided by His Majesty in Council, the same allowances and privileges as the Governor-General or that Governor.[1]

6. Any sums required to give effect to the provisions of this Schedule shall, in the case of the Governor-General or a person acting as such, be paid out of and charged on the revenues of the Federation and, in the case of a Governor or a person acting as such, be paid out of and charged on the revenues of the Province.

FOURTH SCHEDULE

Sections 24, 67, 200, 220

Forms of Oaths or Affirmations

1

Form of oath or affirmation to be taken or made by a member of a Legislature who is a British subject :—

[1] The allowances, and customs privileges of the Governors and acting Governors have been laid down in the Government of India (Governor's Allowances and Privileges) Order, 1936. See the India and Burma (Transitory Provisions) Order, 1937.

'I, A.B., having been elected [*or* nominated *or* appointed] a member of this Council [*or* Assembly], do solemnly swear [*or* affirm] that I will be faithful and bear true allegiance to His Majesty the King, Emperor of India, His heirs and successors, and that I will faithfully discharge the duty upon which I am about to enter.'

2

Form of oath or affirmation to be taken or made by a member of a Legislature who is the Ruler of an Indian State :—

'I, A.B., having been elected [*or* nominated *or* appointed] a member of this Council [*or* Assembly], do solemnly swear [*or* affirm] that I will be faithful and bear true allegiance in my capacity as Member of this Council [*or* Assembly] to His Majesty the King, Emperor of India, His heirs and successors, and that I will faithfully discharge the duty upon which I am about to enter.'

3

Form of oath or affirmation to be taken or made by a member of a Legislature who is a subject of the Ruler of an Indian State :—

'I, A.B., having been elected [*or* nominated *or* appointed] a member of this Council [*or* Assembly], do solemnly swear [*or* affirm] that saving the faith and allegiance which I owe to C.D., his heirs and successors, I will be faithful and bear true allegiance in my capacity as Member of this Council [*or* Assembly] to His Majesty the King, Emperor of India, His heirs and successors, and that I will faithfully discharge the duty upon which I am about to enter.'

4

Form of judicial oath or affirmation to be taken or made by a British subject :—

'I, A.B., having been appointed Chief Justice [*or* a judge] of the Court do solemnly swear [*or* affirm] that I will be faithful and bear true allegiance to His Majesty the King, Emperor of India, His heirs and successors and that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment.'

5

Form of judicial oath or affirmation to be taken or made by a subject of the Ruler of an Indian State :—

'I, A.B., having been appointed Chief Justice [*or* a judge] of the Court do solemnly swear [*or* affirm] that saving the faith and allegiance which I owe to

C.D., his heirs and successors, I will be faithful and bear true allegiance in my judicial capacity to His Majesty the King, Emperor of India, His heirs and successors, and that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment.'

FIFTH SCHEDULE [1]

Section 61

AMENDMENT : *By the Government of India (Provincial Legislative Assemblies) Order, 1936, the following amendment to the Fifth Schedule has been made under s. 308 (4) :*

In paragraph twelve of the Fifth Schedule to the Act (which relates to the qualifications to be possessed by members of a Provincial Legislative Assembly) for the words 'shall not be qualified to hold a seat' there shall be substituted the words 'shall not be qualified to be chosen to fill a seat'.

COMPOSITION OF PROVINCIAL LEGISLATURES

General qualification for Membership

1. A person shall not be qualified to be chosen to fill a seat in a Provincial Legislature unless he—
   (*a*) is a British subject or the Ruler or a subject of an Indian State which has acceded to the Federation or, if it is so prescribed with respect to any Province, the Ruler or a subject of any prescribed Indian State ; and
   (*b*) is, in the case of a seat in a Legislative Assembly, not less than twenty-five years of age, and in the case of a seat in a Legislative Council, not less than thirty years of age ; and
   (*c*) possesses such, if any, of the other qualifications specified in, or prescribed under, this Schedule as may be appropriate in his case.

2. Upon the expiration of the term for which he is chosen to serve as a member of a Provincial Legislature, a person, if otherwise duly qualified, shall be eligible to be chosen to serve for a further term.

Legislative Assemblies

3. The allocation of seats in Provincial Legislative Assemblies shall be as shown in the relevant Table of Seats appended to this Schedule.

[1] See (Scheduled Castes) Order, 1936; (Provincial Legislative Assemblies) Order; (Provincial Legislative Councils) Order, 1936 and (Provincial Legislature) (Miscellaneous Provisions) Order, 1936.

4. In the Legislative Assembly of each Province specified in the first column of the Table of Seats there shall be the number of seats specified in the second column opposite to that Province, and of those seats—

(i) the number specified in the third column shall be general seats, of which the number specified in the fourth column shall be reserved for members of the scheduled castes and, in the case of Bombay, seven shall be reserved for Marathas;

(ii) the numbers specified in the next ten columns shall be the numbers of seats to be filled by persons chosen to represent respectively—(*a*) backward areas and backward tribes; (*b*) the Sikh community; (*c*) the Muhammadan community; (*d*) the Anglo-Indian community; (*e*) the European community; (*f*) the Indian Christian community; (*g*) the interests of commerce, industry, mining and planting; (*h*) landholders; (*i*) universities; and (*j*) the interests of labour; and

(iii) the numbers specified in the last five columns shall be the numbers of seats (being either general seats, Sikh seats, Muhammadan seats, Anglo-Indian seats or Indian Christian seats) reserved for women.

In the Punjab one of the landholders' seats shall be a seat to be filled by a Tumandar.

5. A Province, exclusive of any portion thereof which His Majesty in Council may deem unsuitable for inclusion in any constituency or in any constituency of any particular class, shall be divided into territorial constituencies—

(i) for the election of persons to fill the general seats;

(ii) for the election of persons to fill the Sikh seats, if any;

(iii) for the election of persons to fill the Muhammadan seats;

(iv) for the election of persons to fill the Anglo-Indian seats, if any;

(v) for the election of persons to fill the European seats, if any; and

(vi) except in the case of Bihar, for the election of persons to fill the Indian Christian seats, if any,

or, if as respects any class of constituency it is so prescribed, may form one territorial constituency.

In the case of each such class of constituency as aforesaid the total number of seats available shall be distributed between the constituencies by the assignment of one or more of those seats to each constituency.

6. The required number of general seats to be reserved for members of the scheduled castes, and in the Province of Bombay for Marathas, shall be reserved by reserving for members of those castes or, as the case may be, for Marathas one or more seats in

each of so many of the general territorial constituencies as may be necessary, so, however, that in each such constituency there shall be at least one unreserved seat.

7. In a province in which any general seats are reserved for members of the scheduled castes, all members of those castes who are entitled to vote in a constituency in which any seat is so reserved shall be entitled to take part in a primary election held for the purpose of electing four candidates for each seat so reserved and no member of those castes not elected as a candidate at such an election shall be qualified to hold—

(*a*) a seat so reserved in that constituency;

(*b*) if it is so prescribed as respects that Province, any seat in that constituency.

In relation to bye-elections this paragraph shall have effect with such adaptations and modifications as may be prescribed.

8. The persons to fill the seats specified in columns fifteen to nineteen of the Table of Seats as seats to be filled by women shall be chosen in territorial constituencies, which shall be either—

(*a*) constituencies formed under paragraph five of this Schedule; or

(*b*) constituencies specially formed for the purpose of electing women members.

9. The provisions of the Sixth Schedule to this Act shall have effect with respect to the persons who are entitled to vote at elections in the territorial constituencies mentioned in paragraphs five and eight of this Schedule.

10. In a Province in which any seats are to be filled by representatives of backward areas or backward tribes, representatives of commerce, industry, mining and planting, representatives of landholders, representatives of universities or representatives of labour, persons to fill those seats, and in Bihar the person to fill the Indian Christian seat, shall be chosen in such manner as may be prescribed:

Provided that in a Province in which any seats are to be filled by representatives of backward areas or backward tribes some or all of those seats may, if it is so prescribed, be treated in the prescribed manner as additional general seats to be reserved for representatives of such areas or tribes.

11. In the Punjab the landholder's seat to be filled by a Tumandar shall be assigned to such constituency as may be prescribed.

12. A person shall not be qualified to *be chosen to fill* a seat in the Legislative Assembly of a Province unless—

(*a*) in the case of a seat to be filled by a woman, by a European, by an Indian Christian, by a representative of backward areas or backward tribes, by a representative of commerce, industry, mining and planting, by

a representative of universities or by a representative of labour, he possesses such qualifications as may be prescribed ; and

(*b*) in the case of any other seat, he is entitled to vote in the choice of a member to fill that seat or any other seat of a similar class in that Province.

Legislative Councils

13. The allocation of seats in the Legislative Councils of Provinces having such Councils shall be as shown in the relevant Table of Seats appended to this Schedule.

14. In the Legislative Council of each Province specified in the first column of the Table of Seats there shall be the number of seats specified in the second column opposite to that Province, and of those seats—

(*a*) the number specified in the third column shall be general seats ;

(*b*) the numbers specified in the fourth, fifth and sixth columns shall be seats to be filled by persons chosen to represent respectively the Muhammadan community, the European community and the Indian Christian community ;

(*c*) the number specified in the seventh column shall be seats to be filled by persons elected by the members of the Legislative Assembly of the Province in accordance with the system of proportional representation by means of the single transferable vote ; and

(*d*) the number specified in the eighth column shall be seats to be filled by persons chosen by the Governor in his discretion.

15. A Province, exclusive of any portion thereof which His Majesty in Council may deem unsuitable for inclusion in any constituency or in any constituency of any particular class, shall be divided into territorial constituencies—

(i) for the purpose of electing persons to fill the general seats ;

(ii) for the purpose of electing persons to fill the Muhammadan seats ;

(iii) for the purpose of electing persons to fill the European seats ;

(iv) for the purpose of electing persons to fill the Indian Christian seats, if any,

or, if as respects any class of constituency it is so prescribed, may form one territorial constituency.

In the case of each such class of constituency as aforesaid the total number of seats available shall be distributed between the constituencies by the assignment of one or more of those seats to each constituency.

16. At an election in a constituency to fill a general seat, persons entitled to vote in a Muhammadan constituency, a European constituency, or an Indian Christian constituency shall not be entitled to vote.

In the case of a Muhammadan constituency, a European constituency, or an Indian Christian constituency no person shall be entitled to vote who is not, as the case may be, a Muhammadan, a European, or an Indian Christian.

17. The qualifications entitling a person to vote in territorial constituencies at elections of members of a Provincial Legislative Council, and the qualifications to be possessed by members of such Councils, shall be such as may be prescribed.

18. The term of office of a member of the Legislative Council of a Province, other than a member chosen to fill a casual vacancy, shall be nine years, but upon the first constitution of the Council the Governor in his discretion shall make by order such provision as he thinks fit, by curtailing the term of office of some of the members then chosen, for securing that, as nearly as may be, one-third of the members holding seats of each class shall retire in every third year thereafter.

A member chosen to fill a casual vacancy shall be chosen to serve for the remainder of his predecessor's term of office.

General

19. In the foregoing provisions of this Schedule the following expressions have the meanings hereby assigned to them, that is to say,—

'a European,' 'an Anglo-Indian,' 'an Indian Christian' and 'the scheduled castes' have the same meanings respectively as they have in Part I of the First Schedule to this Act;

'backward areas' and 'backward tribes' mean respectively such areas and tribes as His Majesty in Council may from time to time declare to be areas and tribes to which a special system of representation is more appropriate; and

'prescribed' means prescribed by His Majesty in Council or, so far as regards any matter which under this Act the Provincial Legislature or the Governor are competent to regulate, prescribed by an Act of that Legislature or by a rule made under the next succeeding paragraph.

20. In so far as provision with respect to any matter is not made by this Act or by His Majesty in Council or, after the constitution of the Provincial Legislature, by Act of that Legislature (where the matter is one with respect to which that Legislature is competent to make laws), the Governor, exercising his individual judgment, may make rules for carrying into effect the foregoing provisions of

this Schedule and the provisions of the Sixth Schedule and securing the due constitution of the Provincial Legislature and in particular, but without prejudice to the generality of the foregoing words, with respect to—

(i) the notification of vacancies, including casual vacancies, and the proceedings to be taken for filling vacancies ;
(ii) the nomination of candidates ;
(iii) the conduct of elections, including the application to elections of the principle of proportional representation by means of the single transferable vote, and the rules to regulate elections where certain of the seats to be filled are reserved for members of the scheduled classes, or in the case of Bombay for Marathas, or where certain of the seats allotted to any community must be held by a woman or by a specified type of landholder ;
(iv) the expenses of candidates at elections ;
(v) corrupt practices and other offences at or in connection with elections ;
(vi) the decision of doubts and disputes arising out of or in connection with elections ; and
(vii) the manner in which the rules are to be carried into effect.[1]

[1] See s. 291 and notes thereunder. The Governor, under the powers conferred on him by this paragraph, has made Rules for the Provincial Legislatures :—The Legislative Assembly Electoral (Preparation, Revision and Publication of Electoral Rolls) Rules, 1936 ; the Council Electoral (Preparation, Revision and Publication of Electoral Rolls) Rules, 1936 ; the Legislative Assembly Electoral (Conduct of Elections) Rules, 1936 ; the Legislative Council Electoral (Conduct of Elections) Rules, 1936 ; the Legislative Assembly and the Legislative Council Electoral (Election Expenses and Election Petitions) Rules, 1936 ; and the Legislative Assembly and the Legislative Council (Prohibition of Simultaneous Membership) Rules, 1936.

Provincial Legislative Assemblies

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
		General Seats												Seats for Women				
Province	Total Seats	Total of General Seats	General Seats reserved for Scheduled Castes	Seats for representatives of backward areas and tribes	Sikh Seats	Muhammadan Seats	Anglo-Indian Seats	European Seats	Indian Christian Seats	Seats for representatives of commerce, industry, mining and planting	Landholders' Seats	University Seats	Seats for representatives of labour	General	Sikh	Muhammadan	Anglo-Indian	Indian Christian
Madras	215	146	30	1	—	28	2	3	8	6	6	1	6	6	—	1	—	1
Bombay	175	114	15	1	—	29	2	3	3	7	2	1	7	5	—	1	—	—
Bengal	250	78	30	—	—	117	3	11	2	19	5	2	8	2	—	2	1	—
United Provinces ..	228	140	20	—	—	64	1	2	2	3	6	1	3	4	—	2	—	—
Punjab	175	42	8	—	31	84	1	1	2	1	5	1	3	1	1	2	—	—
Bihar	152	86	15	7	—	39	1	2	1	4	4	1	3	3	—	1	—	—
Central Provinces and Berar	112	84	20	1	—	14	1	1	—	2	3	1	2	3	—	—	—	—
Assam	108	47	7	9	—	34	—	1	1	11	—	—	4	1	—	—	—	—
North-West Frontier Province	50	9	—	—	3	36	—	—	—	—	2	—	—	—	—	—	—	—
Orissa	60	44	6	5	—	4	—	—	1	1	2	—	1	2	—	—	—	—
Sind	60	18	—	—	—	33	—	2	—	2	2	—	1	1	—	1	—	—

In Bombay seven of the general seats shall be reserved for Marathas.
In the Punjab one of the Landholders' seats shall be a seat to be filled by a Tumandar.
In Assam and Orissa the seats reserved for women shall be non-communal seats.

TABLE OF SEATS

Provincial Legislative Council

1	2	3	4	5	6	7	8
Province	Total of Seats	General Seats	Muhammadan Seats	European Seats	Indian Christian Seats	Seats to be filled by Legislative Assembly	Seats to be filled by Governor
Madras	Not less than 54 Not more than 56	35	7	1	3	—	Not less than 8. Not more than 10.
Bombay	Not less than 29 Not more than 30	20	5	1	—	—	Not less than 3. Not more than 4.
Bengal	Not less than 63 Not more than 65	10	17	3	—	27	Not less than 6. Not more than 8.
United Provinces ..	Not less than 58 Not more than 60	34	17	1	—	—	Not less than 6. Not more than 8.
Bihar	Not less than 29 Not more than 30	9	4	1	—	12	Not less than 3. Not more than 4.
Assam	Not less than 21 Not more than 22	10	6	2	—	—	Not less than 3. Not more than 4.

SIXTH SCHEDULE[1]

Schedule 5 (9)

PROVISIONS AS TO FRANCHISE

AMENDMENTS: *By the Government of India (Provincial Legislative Assemblies) Order, 1936, the following amendments to the Sixth Schedule have been made under s. 308 (4):*

In paragraph six of Part I of the Sixth Schedule to the Act (which relates to the preparation of electoral rolls) the words 'or vote at any election to fill a general seat therein' shall be repealed.

3. *At the end of paragraph seven of Part I of the Sixth Schedule to the Act, there shall be added the following provision:*

> *'If a person votes in more than one constituency in contravention of this paragraph, his votes in each of the constituencies shall be void.'*

4. *For the purposes of any provision of the Sixth Schedule to the Act which requires that in certain cases a person shall not be included in an electoral roll unless an application is made by or on behalf of that person for that purpose, an application made before the date of this Order with a view to facilitating the provisional preparation of electoral rolls may be treated as a sufficient application.*[2]

PART I

General

1. There shall be an electoral roll for every territorial constituency and no person who is not, and, except as expressly provided by this Schedule, every person who is, for the time being included in the electoral roll for any such constituency shall be entitled to vote in that constituency.

2. The electoral rolls for the territorial constituencies shall be made up and from time to time in whole or in part revised by reference to such date, in this Schedule referred to as 'the prescribed date', as may be directed in each case by the Governor, exercising his individual judgment.

3. No person shall be included in the electoral roll for any territorial constituency unless he has attained the age of twenty-one years and is either—

(*a*) a British subject; or

(*b*) the Ruler or a subject of a Federated State; or

(*c*) if and so far as it is so prescribed with respect to any Province, and subject to any prescribed conditions, the Ruler or a subject of any other Indian State.

[1] See (Scheduled Castes) Order, 1936; (Provincial Legislative Assemblies) Order, 1936 and (Provincial Legislature) (Miscellaneous Provisions) Order, 1936.

[2] The other amendments made by this Order have been printed in italics where made.

4. No person shall be included in the electoral roll for, or vote at any election in, any territorial constituency if he is of unsound mind and stands so declared by a competent court.

5. No person shall be included in the electoral roll for a Sikh constituency, a Muhammadan constituency, an Anglo-Indian constituency, a European constituency or an Indian Christian constituency unless he is a Sikh, a Muhammadan, an Anglo-Indian, a European or an Indian Christian, as the case may be.

6. No person who is or is entitled to be included in the electoral roll for any Sikh constituency, Muhammadan constituency, Anglo-Indian constituency, European constituency or Indian Christian constituency in any Province shall be included in the electoral roll for a general constituency in that Province : [*or vote at any election to fill a general seat therein* :][1]

Provided that this paragraph shall not apply in relation to the general seats reserved for women in Assam and Orissa or the constituencies for the election of persons to fill those seats.

7. No person shall in any Province vote at a general election in more than one territorial constituency, and in each Province such provisions, if any, as may be prescribed in relation to that Province shall have effect for the purpose of preventing persons being included in the electoral roll for more than one territorial constituency in the Province :

Provided that, in any Province in which territorial constituencies have been specially formed for the purpose of electing women members, nothing in this paragraph or in any such provisions shall prevent a person from being included in the electoral roll for, and voting at a general election in, one territorial constituency so formed and also one territorial constituency not so formed.

8. No person shall be included in the electoral roll for, or vote at any election in, a territorial constituency if he is for the time being disqualified from voting under the provisions of any such Order in Council, Act of the Provincial Legislature or rules made by the Governor as may be made or passed under this Act with respect to corrupt practices and other offences in connection with elections, and the name of any person who becomes so disqualified shall forthwith be struck off all the electoral rolls for territorial constituencies in which it may be included.

9. No person shall vote at any election in any territorial constituency, if he is for the time being undergoing a sentence of transportation, penal servitude, or imprisonment.

10. The following provisions shall have effect with respect to the enfranchisement of women in respect of the qualifications of their husbands—

[1] The words in italics have been omitted by the Order.

(*a*) a woman who, at the date of the death of her husband, is included in an electoral roll for a territorial constituency by virtue of his qualifications shall, notwithstanding anything in the subsequent provisions of this Schedule, continue to be on the roll for that constituency unless she remarries or becomes disqualified under the foregoing provisions of this Schedule for inclusion in that roll;

(*b*) not more than one woman shall at any one time appear in the electoral rolls for the territorial constituencies in a Province in respect of the qualifications of any particular man and any question which of several women is to be selected for inclusion shall be determined in the prescribed manner:

Provided that, if a woman who is entitled by virtue of sub-paragraph (*a*) of this paragraph to remain on the roll of a territorial constituency changes her place of residence, then, if she so desires, she may, on any subsequent revision of the roll, be transferred to the roll of such other territorial constituency as may be appropriate.

11. For the purposes of this Schedule any property owned, held, or occupied or payment made by, or assessment made on, a person as a trustee, guardian, administrator or receiver or in any other fiduciary capacity, shall, except as otherwise expressly provided in this Schedule, be left out of account.

12. This Schedule shall have effect as if any reference therein to an officer, non-commissioned officer, or soldier of His Majesty's regular military forces included a reference to an officer or man of any British India police force, not being an officer or man who has been dismissed or discharged from that force for disciplinary reasons, and a reference to an officer, non-commissioned officer or soldier of the Auxiliary Force (India) or the Indian Territorial Force, not being an officer, non-commissioned officer or soldier who has been dismissed or discharged from the force for disciplinary reasons, or has served in the force for less than four years.

13.—(1) In this Schedule, except where the context otherwise requires—

'territorial constituency' means one of the territorial constituencies mentioned in paragraphs five and eight of the Fifth Schedule to this Act;

'European,' 'Anglo-Indian,' 'Indian Christian' and 'scheduled castes' have the same meanings respectively as they have in Part I of the First Schedule to this Act;

'Indian Christian constituency' does not include any constituency which may be formed for choosing persons to fill the Indian Christian seat in Bihar;

'person' does not include a body of persons;

'prescribed,' except in the phrase 'the prescribed date,' has the same meaning as in the Fifth Schedule to this Act;

'previous financial year,' 'previous Bengali year' and 'previous fasli year' mean, respectively, the financial year, the Bengali year, and the fasli year immediately preceding that in which the prescribed date falls;

'house' and 'building' include, respectively, a part of a house or building separately occupied as a dwelling or for the purposes of any trade, business, or profession;

'literate' means, in relation to any person, able to read and write in some language or dialect selected by him, being a language or dialect in common use in some part of India;

'cantonment' means a cantonment for the purposes of the Cantonments Act, 1924, and 'cantonment record' means a record prepared under that Act.

(2) Any reference in this Schedule to 'urban constituencies' or 'rural constituencies' shall be construed as a reference to such territorial constituencies as may be classified as urban or rural constituencies, respectively, by an Order in Council delimiting territorial constituencies:

Provided that any such Order in Council may direct that any Anglo-Indian constituency, European constituency, or Indian Christian constituency shall be deemed to be an urban constituency for some purposes and a rural constituency for other purposes.

(3) Any reference in this Schedule to persons assessed to income tax in any financial year shall be deemed to include a reference to any partner in a firm assessed to income tax in that year if his share of the firm's income on which income tax was so assessed is certified in the prescribed manner to have been not less than the minimum on which the tax is leviable.

(4) If any question arises under this Schedule whether any person is or is not a Sikh, he shall be deemed to be a Sikh if and only if he makes in the prescribed manner a declaration in the prescribed form that he is a Sikh.

(5) Any reference in this Schedule to a retired, pensioned or discharged officer, non-commissioned officer or soldier of any force shall be deemed not to include a reference to any person who has been dismissed or discharged from that force for disciplinary reasons.

(6) Any reference in this Schedule to all or any of the provisions of any Indian Act shall be construed as a reference to those provisions as amended by or under any other Act or, if those provisions are repealed and re-enacted with or without modification, to the provisions so re-enacted.

(7) If the boundaries of any district or other administrative area mentioned in this Schedule are altered, any reference in this Schedule to that district or area shall thereafter be taken as a reference to the district or area as altered.

PART II

MADRAS

General requirement as to residence

1. No person shall be qualified to be included in the electoral roll for a territorial constituency unless he has resided in a house in the constituency for a period of not less than one hundred and twenty days in the previous financial year.

A person is deemed to reside in a house if he sometimes uses it as a sleeping place and a person is not deemed to cease to reside in a house merely because he is absent from it or has another dwelling in which he resides, if he is at liberty to return to the house at any time and has not abandoned his intention of returning.

Qualifications dependent on taxation

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for any territorial constituency if in the previous financial year he—

(*a*) paid tax under the Madras Motor Vehicles Taxation Act, 1931, for the whole of that year ; or

(*b*) paid for both the half years of that year to a municipality, local board or cantonment authority in the Province profession tax under the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, the Madras Local Boards Act, 1920, or the Cantonments Act, 1924 ; or

(*c*) paid for both the half years of that year to a municipality or cantonment authority in the Province property tax under any of the said Acts ; or

(*d*) paid for both the half years of that year house tax under the Madras Local Boards Act, 1920 ; or

(*e*) occupied as sole tenant throughout that year a house in respect of which property tax or house tax has been paid for both the half years of that year under any of the Acts mentioned in this paragraph ; or

(*f*) was assessed to income tax.

Qualifications dependent on property, etc.

3. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he—

(*a*) was on the last day of the previous fasli year a registered landholder, inamdar, ryotwari pattadar or occupancy ryot under the Madras Estates Land Act, 1908 ; or

(*b*) was in and for the previous fasli year assessed to ground rent payable to the Government of the Province ; or

(*c*) was throughout the previous fasli year a kanamdar or kuzhikanamdar or the holder of a kudiyiruppu or a verumpattamdar having fixity of tenure, each of these terms having the meaning assigned to it in the Malabar Tenancy Act, 1929 ; or

(*d*) was throughout the previous fasli year a mortgagee with possession or lessee, under a registered instrument, of immovable property in the Province (other than house property) of an annual rent value, in the case of an urban constituency, of not less than one hundred rupees, and, in the case of a rural constituency of not less than fifty rupees.

4.—(1) Sub-paragraph (*a*) of the last preceding paragraph shall not apply in relation to registered joint landholders, registered joint inamdars, registered joint ryotwari pattadars or registered joint occupancy ryots, but in relation to such persons (being persons so registered on the last day of the previous fasli year) the following provisions of this paragraph shall have effect.

(2) Where the joint holding of any joint landholders or joint holders of a whole-inam village is of an annual rental of one thousand rupees or upwards, then, subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, one registered joint holder for every complete five hundred rupees of the annual rental of the joint holding shall be qualified to be included in the electoral roll of the appropriate territorial constituency.

(3) Where the annual assessment, rent or kist of the joint holding of joint holders of a minor inam, a ryotwari patta or an estate patta is one hundred rupees or upwards, then, subject as aforesaid, one registered joint holder for every complete fifty rupees of the annual assessment, rent or kist shall be qualified to be included in the electoral roll of the appropriate territorial constituency.

(4) In other cases, one of the registered joint holders shall, subject as aforesaid, be qualified to be included in the electoral roll of the appropriate territorial constituency.

(5) The registered holders to be included under this paragraph in an electoral roll in respect of a joint holding shall be those nominated in an application in that behalf, signed by a majority of the registered joint holders.

Qualification by reason of guardianship

5. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is on the prescribed date the guardian of a minor who by virtue of the foregoing provisions of this Part of this Schedule would have been entitled to be included in the electoral roll for that constituency if he were of full age and satisfied the requirements of paragraph one of this Part of this Schedule.

Qualification by reason of literacy

6. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is proved in the prescribed manner to be literate.

Qualification by reason of service in His Majesty's Forces

7. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces.

Additional qualifications for women

8. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency—

(*a*) if she is the pensioned widow or the pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces ; or

(*b*) if her husband possesses the qualifications requisite for the purpose of this paragraph.

9. A husband shall be deemed to possess the qualifications requisite for the purposes of the last preceding paragraph if he either—

(*a*) was assessed in the previous financial year to income tax ; or

(*b*) is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces ; or

(*c*) occupied for not less than six months in the previous financial year a house in the City of Madras the annual value whereof was not less than sixty rupees, not being a house in any military or police lines ; or

(*d*) was assessed in the Province in the previous financial year to tax on companies ; or

(*e*) was assessed in the Province in the previous financial year to an aggregate amount of not less than three rupees in respect of either or both of the following taxes, namely, property tax or profession tax ; or

(*f*) *was on the last day of the previous fasli year registered* as a ryotwari pattadar or an inamdar of land the annual rent value whereof is not less than ten rupees ; or

(*g*) *held throughout the previous fasli year* under a ryotwari pattadar or an inamdar a registered lease of land the annual rent value whereof is not less than ten rupees ; or

(*h*) *was on the last day of the previous fasli year registered* jointly with the proprietor under section fourteen of the Malabar Land Registration Act, 1895, as

the occupant of land the annual rent value whereof is not less than ten rupees ; or

(i) *was on the last day of the previous fasli year a registered landholder* holding an estate the annual rent value whereof is not less than ten rupees ; or

(j) *held on the last day of the previous fasli year* as ryot, or as tenant under a landholder, land the annual rent value whereof is not less than ten rupees.

Special qualification for Scheduled Castes

9A. Subject to the provisions of part 1 of this Schedule and to any overriding provisions of this part of this Schedule, a person who is a member of the scheduled castes shall be qualified to be included in the electoral roll for any territorial constituency if throughout the previous fasli year he occupied as owner or lessee a house in a municipality, a cantonment or an area subject to the jurisdiction of a local board, with an annual rent value of not less than eighteen rupees, or a house elsewhere with an annual rent value of not less than twelve rupees.

Application necessary for enrolment in certain cases

10. No person shall, by virtue of sub-paragraph (e) of paragraph two, sub-paragraph (c) or sub-paragraph (d) of paragraph three, paragraph five or paragraph six of this part of this schedule, or by virtue of her husband being a retired, pensioned or discharged officer, non-commissioned officer or soldier, be included in the electoral roll for any territorial constituency, unless application is made in the prescribed manner by, or, if it is so prescribed, on behalf of, that person, that that person should be so included.

General provisions as to joint property, etc.

11.—(1) Subject to the provisions of this paragraph, property held and payments made jointly by, and assessments made jointly on, more than one person, shall be left out of account for the purposes of this Part of this Schedule.

(2) Where any such property, payments or assessments would qualify a person if they had been held or made by, or made on, him solely, then, subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, one of those persons shall be qualified in respect of the property, payment or assessment and that person shall be—

(a) if the property is held, or the payments or assessments made, by or on a Hindu joint family, the manager thereof ;

(b) if the property is held or the payments or assessments made by or on any other joint family, the member thereof authorised in that behalf by the family themselves ;

(c) in any other case, the person authorised in that behalf by a majority of the persons by or on whom the property is held or the payments or assessments made.

(3) Nothing in this paragraph affects paragraph four of this Part of this Schedule, or the provisions of Part I of this Schedule relating to partners in firms assessed to income tax.

Interpretation, etc.

12.—(1) In this Schedule, in relation to Madras—

'estate' means an estate as defined in the Madras Estates Land Act, 1908;

'fasli year' means a year ending on the thirtieth day of June;

'landholder' means a person owning an estate or part of an estate and includes every person entitled to collect the rent of the whole or part of an estate by virtue of any transfer from the owner or his predecessor in title or of any order of a competent court, or of any provision of law;

'rent value' means the value as determined in accordance with the provisions of section seventy-nine of the Madras Local Boards Act, 1920, with reference to the accounts of the previous fasli year or, in any case in which it is not possible so to determine the rent value, such value as appears to the registration officer to be the rent value;

'tenant' includes all persons who, whether personally or by an agent, occupy a house or land under the owner or landholder or intermediate landholder, whether or not rent is paid to the owner, landholder or intermediate landholder, as the case may be, except that it does not include any person occupying a house in military or police lines rent free by virtue of any office, service or employment.

(2) A person who is paying or is liable to pay the rent of a house shall be deemed to occupy it.

(3) References in this part of this Schedule to, or to taxes payable in respect of, land or houses relate exclusively to land or houses in the Province.

PART III

BOMBAY

General requirement as to residence

1. No person shall be qualified to be included in the electoral roll for a territorial constituency unless he satisfies the requirement as to residence in relation to that constituency.

For the purposes of this Part of this Schedule a person shall be deemed to satisfy the requirement as to residence—

(a) in relation to a Bombay city constituency, if he has for a period of not less than one hundred and eighty days in the previous financial year resided in a house in the city of Bombay or in the Thana mahal or the South Salsette taluka;

(b) in relation to any other urban constituency, if he has for a period of not less than one hundred and eighty days in the previous financial year resided in a house in the constituency or within two miles of the boundary thereof;

(c) in the case of a rural constituency, if he has for a period of not less than one hundred and eighty days in the previous financial year resided in a house in the constituency, or in a contiguous constituency of the same communal description:

Provided that a person shall be deemed to satisfy the requirement as to residence in relation to any European or Anglo-Indian territorial constituency if he has for a period of not less than one hundred and eighty days in the previous financial year resided in a house in the Province.

A person is deemed to reside in a house if he sometimes uses it as a sleeping place, and a person is not deemed to cease to reside in a house merely because he is absent from it or has another dwelling in which he resides, if he is at liberty to return to the house at any time and has not abandoned his intention of returning.

Qualifications dependent on taxation

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for any territorial constituency, if he was assessed during the previous financial year to income tax.

Qualifications dependent on property

3. Subject as aforesaid a person shall also be qualified to be included in the electoral roll for any territorial constituency if he—

(a) holds in his own right, or occupies as a tenant, alienated or unalienated land or land on talukdari tenure, being land in the constituency assessed at, or of the assessable value of, not less than eight rupees land revenue; or

(b) is the alienee of the right of the Government to the payment of rent or land revenue amounting to not less than eight rupees in respect of alienated land in the constituency; or

(c) is a khot or sharer in a khoti village in the constituency, or a sharer in a bhagdari or narwadari village in the

constituency, and is responsible for the payment of not less than eight rupees land revenue ; or

(*d*) occupies in the constituency as owner or tenant a house or building, situate in the city of Bombay or in any municipal borough, municipal district, cantonment or notified area, and having at least the appropriate value.

In sub-paragraph (*d*) of this paragraph, the expression 'the appropriate value' means—

(i) in relation to a house or building situate within the city of Bombay, an annual rental value of sixty rupees ;

(ii) in relation to a house or building situate outside the city of Bombay but in an area in which a tax is based on the annual rental value of houses or buildings, an annual rental value of eighteen rupees ;

(iii) in relation to any other house or building, a capital value of seven hundred and fifty rupees.

Educational qualification

4. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is proved in the prescribed manner to have passed the matriculation or school leaving examination of the University of Bombay, or an examination prescribed as at least equivalent to either of those examinations, or, if it is so prescribed, any other prescribed examination, not lower than a vernacular final examination.

Qualification by reason of service in His Majesty's Forces

5. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces.

Additional qualification for women

6. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency—

(*a*) if she is the pensioned widow or the pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces ; or

(*b*) if she is shown in the prescribed manner to be literate ; or

(*c*) if her husband possesses the qualifications requisite for the purposes of this paragraph.

7. A husband shall not be deemed to possess the qualifications requisite for the purposes of the last preceding paragraph unless

he satisfies the requirement as to residence in relation to the constituency in question, but subject as aforesaid a husband shall be deemed to possess the said qualifications if—

(*a*) in the previous financial year, he was assessed to income tax ; or

(*b*) he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces ; or

(*c*) in the constituency he holds in his own right, or occupies as tenant, alienated or unalienated land or land on talukdari tenure assessed at, or of the assessable value of, not less than sixteen rupees land revenue in the Panch-Mahals sub-division of the Broach and Panch-Mahals district or in the Ratnagiri district, or not less than thirty-two rupees land revenue elsewhere ; or

(*d*) he is the alienee of the right of the Government to the payment of rent or land revenue in respect of alienated land in the constituency amounting to not less than sixteen rupees in the Panch-Mahals sub-division of the Broach and Panch-Mahals district or in the Ratnagiri district and to not less than thirty-two rupees elsewhere ; or

(*e*) he is a khot or sharer in a khoti village in the constituency or a sharer in a bhagdari or narwadari village in the constituency and, in either case, is responsible for the payment, in the Panch-Mahals sub-division of the Broach and Panch-Mahals district or in the Ratnagiri district, of not less than sixteen rupees land revenue, and, elsewhere, of not less than thirty-two rupees land revenue ; or

(*f*) he occupies as owner or tenant in the constituency a house or building situate in the city of Bombay or in a municipal borough, municipal district, cantonment or notified area and having at least the appropriate value.

In sub-paragraph (*f*) of this paragraph, the expression 'appropriate value' means—

(i) in relation to a house or building in the city of Bombay, an annual rental value of one hundred and twenty rupees ;

(ii) in relation to a house or building in the Panch-Mahals sub-division of the Broach and Panch-Mahals district or the Ratnagiri district, situate in an area in which any tax is based on the annual rental value of houses or buildings, an annual rental value of twenty-four rupees ;

(iii) in relation to any other house or building in the Panch-Mahals sub-division of the Broach and Panch-Mahals district or the Ratnagiri district, a capital value of one thousand rupees ;

(iv) in relation to a house or building in any other area in which any tax is based on the annual rental value of houses or buildings, an annual rental value of thirty-six rupees; and

(v) in relation to any other house or building, a capital value of one thousand five hundred rupees.

Special qualification for scheduled castes

8. Subject as aforesaid, a person who is a member of the scheduled castes shall also be qualified to be included in the electoral roll for any territorial constituency if either—

(*a*) he is shown in the prescribed manner to be literate; or

(*b*) he was at any time during the year ending on the thirty-first day of December next preceding the prescribed date a person actually performing in the Province the duties of an inferior village office, whether hereditary or not:

Provided that a person who has been dismissed for misconduct and has not been re-employed shall not by virtue of sub-paragraph (*b*) of this paragraph be qualified to be entered in any electoral roll.

Application necessary for enrolment in certain cases

9. No person shall by virtue of paragraph four or of paragraph six of this Part of this Schedule be included in the electoral roll for any territorial constituency unless application is made in the prescribed manner by him or, if it is so prescribed, on his behalf, that he should be so included:

Provided that, except in relation to the original preparation of electoral rolls and revisions thereof within three years from the commencement of Part III of this Act, this paragraph shall, in relation to women qualified by virtue of their husbands' qualifications, have effect only where the husband's qualification is that mentioned in sub-paragraph (*b*) of paragraph seven of this Part of this Schedule.

Provisions as to joint property, etc.

10.—(1) Subject to the provisions of this paragraph, any reference in this Part of this Schedule to land or other immovable property, or to rent or land revenue in respect of alienated land, shall, in relation to any persons who are co-sharers in such land, property, rent or land revenue, be construed as a reference to the respective shares of those persons.

(2) Where two or more persons occupy any house, the rental value of the house shall, in relation to each of those persons, be deemed to be the rental value thereof divided by the number of those persons.

(3) Where property is owned, held or occupied, or payments are made, jointly by, or assessments are made jointly on, the members of a joint family, and the property, payments or assessments would qualify a person if they had been owned, held, occupied or made by or on him solely, then, subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, one member of the family shall be qualified in respect of the property, payment or assessment, and that person shall be, in the case of a Hindu joint family, the manager thereof and, in other cases, the member authorised in that behalf by the family themselves.

Save as aforesaid, any property owned, held or occupied, or payments made, jointly by, or assessments made jointly on, the members of a joint family shall be left out of account for the purposes of this Part of this Schedule.

(4) Nothing in this paragraph affects the provisions of Part I of this Schedule relating to partners in firms assessed to income tax.

Interpretation, etc.

11.—(1) In this Schedule, in relation to Bombay—

'holder' means a person lawfully in possession of land, whether his possession is actual or not, and 'hold' shall be construed accordingly;

'tenant' means a lessee, whether holding under an instrument or under an oral agreement, and includes a mortgagee of a tenant's rights with possession, and, in relation to a house not situate in military or police lines, also includes any person occupying the house rent-free by virtue of any office, service or employment;

'Bombay city constituency' means a constituency comprising any part of the city of Bombay.

(2) The value of any machinery, furniture or equipment contained in or situate upon any house or building shall not be included in estimating for the purposes of this Part of this Schedule the rental value or the capital value of the house or building.

(3) In computing for the purposes of this Part of this Schedule the assessable value of any land, regard shall be had to the average rate of assessment on assessed land in the same village or, if there is no such land in the same village, the average rate of assessment on assessed land in the nearest village containing assessed land.

Part IV

Bengal

General requirement as to residence

1.—(1) A person shall not be qualified to be included in the electoral roll for any territorial constituency unless he has a place of residence in that constituency:

Provided that—

(a) in the case of a Calcutta constituency, the provisions of this paragraph shall be deemed to be complied with in relation to any person if he has a place of residence in Calcutta and a place of business within the constituency ;

(b) in the case of a European constituency, the provisions of this paragraph shall be deemed to be complied with in relation to any person if he is actually employed anywhere in Bengal but is absent from Bengal on leave from his employment.

(2) In this paragraph 'a place of residence' means a place where a person ordinarily and actually resides during the greater part of the year.

Qualifications dependent on taxation

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for any territorial constituency if he—

(a) has paid before the expiration of the previous year any sum as tax under the Bengal Motor Vehicles Tax Act, 1932, in respect of that year ; or

(b) was assessed during the previous year to income tax ; or

(c) was during the previous year entered in the municipal assessment book or licence register, or any other authorised register maintained by the corporation of Calcutta, as having paid in respect of that year either directly or indirectly any sum as consolidated rate, tax or licence fee to the corporation ; or

(d) has paid during and in respect of the previous year municipal or cantonment taxes or fees of not less than eight annas, or road and public works cesses under the Cess Act, 1880, of not less than eight annas, or Chaukidari tax under the Village Chaukidari Act, 1870, of not less than six annas, or union rate under the Bengal Village Self-Government Act, 1919, of not less than six annas.

Qualifications dependent on property

3. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll of any territorial constituency if at any time during the previous financial or Bengali year he has occupied by virtue of his employment a house in the Province the annual valuation of which is not less than forty-two rupees.

In this paragraph 'annual valuation' means the annual rental of the house as ascertained from any accounts of the employer of

the person in question which are required by or under any law to be regularly audited or, if the annual valuation is not so ascertainable, one-tenth of the annual remuneration received by the person in question for the employment by virtue of which he occupies it.

Educational qualification

4. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is proved in the prescribed manner to have passed the matriculation examination of any prescribed university, or an examination prescribed as at least equivalent to any such examination, or if it is so prescribed, any other prescribed examination, not lower than a final middle school examination.

Qualification by reason of service in His Majesty's forces

5. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces.

Additional qualifications for women

6. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency if she is the pensioned widow or the pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces or if her husband possesses the qualifications requisite for the purposes of this paragraph or if she is shown in the prescribed manner to be literate :

Provided that, in relation to the original preparation of electoral rolls and revisions thereof within three years from the commencement of Part III of this Act, this paragraph shall have effect as if the words ' or if she is shown in the prescribed manner to be literate ' were omitted therefrom.

7. In relation to a Calcutta constituency, a husband shall be deemed to possess the qualifications requisite for the purposes of the last preceding paragraph if—

(*a*) he was during the previous year entered in the municipal assessment book as the owner and occupier of any land or building in Calcutta separately numbered and valued for assessment purposes at not less than one hundred and fifty rupees per annum, or as the owner or occupier of any land or building in Calcutta separately numbered and valued for assessment purposes at not less than three hundred rupees per annum and paid during that year his share of the consolidated rate on the land or building ; or

(*b*) he has paid during and in respect of the previous year on his sole account and in his own name not less than twenty-four rupees either in respect of the taxes levied under Chapter XI, or in respect of the taxes levied under Chapter XII, of the Calcutta Municipal Act, 1923 ; or

(*c*) his name is entered in the municipal assessment book in respect of any land or building in Calcutta in respect of which not less than twenty-four rupees was paid in the previous year in respect of the consolidated rate.

8. In relation to an urban constituency which is not a Calcutta constituency, a husband shall be deemed to possess the qualifications requisite for the said purposes if, during and in respect of the previous year, he paid, in the municipality of Howrah, municipal taxes or fees of not less than three rupees, or, in any other municipal area or cantonment in the Province, municipal or cantonment taxes or fees of not less than one rupee, eight annas.

9. In relation to a rural constituency, a husband shall be deemed to possess the qualifications requisite for the said purposes if, during and in respect of the previous year, he paid not less than one rupee, eight annas in respect of municipal taxes or fees, or not less than one rupee in respect of road and public works cesses under the Cess Act, 1880, or not less than two rupees in respect of Chaukidari tax under the Village Chaukidari Act, 1870, or in respect of union rate under the Bengal Village Self-Government Act, 1919.

10. In relation to any territorial constituency, a husband shall be deemed to possess the qualifications requisite for the said purposes if he either is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces or was assessed in the previous year to income tax, or paid before the expiration of the previous year any sum as tax under the Bengal Motor Vehicles Tax Act, 1932, in respect of that year.

Special provisions as to Darjeeling general constituency

11. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any rural general constituency comprising any part of the Sadar, Kalimpong and Kurseong sub-divisions of the Darjeeling district if that person either—

(*a*) has paid during and in respect of the previous year rent of not less than twenty rupees for any land in the Province situate in a municipal area or for any hired building in the Province, or rent of not less than two rupees for any land in the Province not situate in a municipal area ; or

(*b*) is the wife of a person who, during and in respect of the previous year, has paid rent of not less than sixty rupees for any land in the Province situate in a municipal area or for any hired building in the Province, or

rent of not less than six rupees for any land in the Province not situate in a municipal area.

Application necessary for enrolment in certain cases

12. No person shall by virtue of paragraph three or paragraph four of this Part of this Schedule be included in the electoral roll of any territorial constituency, unless application is made in the prescribed manner by him, or, if it is so prescribed, on his behalf, that he should be so included.

Special provisions as to Muhammadan women's constituency

13. No man shall be included in the electoral roll for, or be entitled to vote at any election in, any Muhammadan constituency specially formed for the election of persons to fill the seats reserved for women.

Interpretation, etc.

14.—(1) In this Schedule, in relation to Bengal,—

'Calcutta' means Calcutta as defined in paragraph 11 of section three of the Calcutta Municipal Act, 1923;

'a Calcutta constituency' means, subject to the provisions of this paragraph with respect to Anglo-Indian constituencies, European constituencies or Indian Christian constituencies, a constituency which comprises any part of Calcutta;

'previous year' means the previous financial year or the previous Bengali year, whichever is appropriate in the particular case;

'Bengali year' means a year ending on the last day of the Bengali month of Chaitra.

(2) Notwithstanding anything in this paragraph, an Order in Council delimiting territorial constituencies may provide that any Anglo-Indian constituency, European constituency or Indian Christian constituency comprising any part of Calcutta, shall, for all or any of the purposes of this Part of this Schedule, be deemed not to be a Calcutta constituency.

(3) Where property is held or payments are made jointly by, or assessments are made jointly on, the members of a joint family, the family shall be adopted as the unit for deciding whether the requisite qualification exists, and if it does exist the person qualified shall be, in the case of a Hindu joint family, the manager thereof, and in other cases the member authorised in that behalf by the family themselves:

Provided that this paragraph shall not apply where members of a joint family have separate accommodation and separate messing, and in any such case any reference in this Part of this Schedule to any property, payment or assessment shall be construed as a reference to each member's share of that property, payment or assessment.

PART V

THE UNITED PROVINCES

General requirement as to residence

1.—(1) A person shall not be qualified to be included in the electoral roll for any territorial constituency unless he is resident in the constituency.

(2) For the purposes of this Part of this Schedule a person shall be deemed to be resident in any area if he ordinarily lives in that area or maintains a dwelling house therein ready for occupation in which he occasionally dwells.

Qualifications dependent on taxation

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for any territorial constituency if he—

(*a*) was assessed during the previous financial year to income tax; or

(*b*) was, in an area wholly or partly within the constituency in which a municipal tax is in force, assessed in the previous financial year to municipal tax on an income of not less than one hundred and fifty rupees per annum.

Qualifications dependent on property

3. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is the owner or tenant of a house or building in the constituency the rental value whereof is not less than twenty-four rupees per annum.

4. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he—

(*a*) owns land in the constituency on which land revenue of not less than five rupees per annum is payable; or

(*b*) owns land in the constituency free of land revenue, if the land revenue nominally assessed on the land for determining the amount of rates payable in respect of the land, either alone or together with any land revenue payable by him as owner of other land in the constituency, amounts to not less than five rupees per annum; or

(*c*) is a tenant of land in the constituency in respect of which rent of not less than ten rupees per annum, or rent in kind equivalent to not less than ten rupees per annum, is payable; or

(d) is an under-proprietor in Oudh of land in the constituency in respect of which under-proprietary rent of not less than five rupees per annum is payable ; or

(e) in the case of a constituency comprising any part of the Hill Pattis of Kumaun, is resident in those Hill Pattis and, in the constituency, either is owner of a fee simple estate in those Hill Pattis, or is assessed to the payment of land revenue or cesses of any amount in those Hill Pattis, or is a Khaikar.

Educational qualification

5. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is proved in the prescribed manner to have passed the upper primary examination, or an examination which is prescribed as the equivalent thereof.

Qualification by reason of service in His Majesty's forces

6. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces.

Special provision as to Shilpkars in the Hill Pattis of Kumaun

7. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency comprising any part of the Hill Pattis of Kumaun if he is a Shilpkar resident in a village in those Hill Pattis and is in the prescribed manner selected and designated as their representative by the Shilpkar families of that village.

Additional qualifications for women

8. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency—

(a) if she is the pensioned widow or the pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces ; or

(b) if she is proved in the prescribed manner to be literate ; or

(c) if her husband possesses the qualifications requisite for the purposes of this paragraph.

9. In relation to any territorial constituency, a husband shall be deemed to possess the qualifications requisite for the purposes of the last preceding paragraph if—

(a) he is the owner or tenant of a house or building in the constituency, the rental value whereof is not less than thirty-six rupees per annum ; or

(*b*) was, in an area in which no house or building tax is in force, assessed in the previous year in the constituency to municipal tax on an income of not less than two hundred rupees per annum ; or

(*c*) owns land in the constituency in respect of which land revenue amounting to not less than twenty-five rupees per annum is payable ; or

(*d*) owns land in the constituency free of land revenue, if the land revenue nominally assessed on the land for determining the amount of rates payable in respect thereof, either alone or together with any land revenue payable by him as owner in respect of other land in the constituency, amounts to not less than twenty-five rupees per annum ; or

(*e*) is resident in the Hill Pattis of Kumaun and, in the constituency, either owns a fee simple estate situate in those Hill Pattis or is assessed to the payment of land revenue or cesses of any amount in those Hill Pattis, or is a Khaikar ; or

(*f*) is, in the constituency, a permanent tenure holder or a fixed rate tenant as defined in the Agra Tenancy Act, 1926, or an under-proprietor or occupancy tenant as defined in the Oudh Rent Act, 1886, and is liable as such to rent of not less than twenty-five rupees per annum ; or

(*g*) holds in the constituency as a tenant, land in respect of which a rent of not less than fifty rupees per annum or a rent in kind equivalent to not less than fifty rupees per annum is payable ; or

(*h*) was assessed in the previous financial year to income tax ; or

(*i*) is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces.

Application necessary for enrolment in certain cases

10.—(1) No person shall by virtue of paragraph five or sub-paragraph (*a*) or sub-paragraph (*b*) of paragraph eight of this Part of this Schedule, or by virtue of her husband being a retired, pensioned or discharged officer, non-commissioned officer or soldier, be included in the electoral roll for any territorial constituency unless application is made in the prescribed manner by, or if it is so prescribed, on behalf of, that person, that that person should be so included.

(2) On the preparation of the original electoral roll for any rural constituency or on any revision of the electoral roll for a rural constituency within three years from the commencement of Part III

of this Act, no person shall by virtue of her husband possessing any of the other qualifications requisite for the purposes of the said paragraph eight be included in the electoral roll unless application is made in the prescribed manner by her, or if it is so prescribed, on her behalf, that she should be so included.

Interpretation, etc.

11.—(1) In this Schedule, in relation to the United Provinces—

'owner' does not include a mortgagee or a lessee, and 'own' shall be construed accordingly;

'tenant' as respects any land in a rural area means a tenant as defined in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, as the case may be, and does not include a sub-tenant, and as respects any house or building means a person who occupies it on payment of rent, or in the case of a house, not situate in military or police lines, a person who occupies it rent free by virtue of any office, service or employment;

'under-proprietor' means an under-proprietor as defined in the Oudh Rent Act, 1886;

'Khaikar' means a person recorded as such in the records of rights of land in the Hill Pattis of Kumaun;

'building' means a building as defined in the United Provinces Municipalities Act, 1916;

'rental value' means the value of a house or building based on the amount of annual rent;

'municipal tax' and 'house or building tax', mean the taxes respectively known by those names imposed under the United Provinces Municipalities Act, 1916, the United Provinces Town Areas Act, 1914, and the Cantonments Act, 1924;

'urban area' means a municipality or notified area as defined in subsection (9) of section two, and subsection (2) of section three hundred and thirty-seven of the United Provinces Municipalities Act, 1916, or a town area as defined in the United Provinces Town Areas Act, 1914, or a cantonment;

'rural area' means an area which is not an urban area.

(2) Where property is held or payments are made jointly by, or assessments are made jointly on, the members of a joint family or joint tenancy, the family or tenancy shall be adopted as the unit for deciding whether under this Part of this Schedule the requisite qualification exists, and if it does exist, the person qualified shall be, in the case of a joint Hindu family, the manager thereof or, if there is no manager, the member nominated in that behalf by the majority of the family, and in other cases the member nominated in that behalf by the family or tenancy concerned.

PART VI

THE PUNJAB

General requirements as to residence

1. No person shall be qualified to be included in the electoral roll for a territorial constituency unless he is resident in the constituency.

For the purposes of this Part of this Schedule proof that a person owns a family dwelling-house or a share in a family dwelling-house in a constituency and that that house has not during the twelve months preceding the prescribed date been let on rent either in whole or in part shall be sufficient evidence that that person is resident in the constituency.

Qualifications dependent on taxation

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for a territorial constituency if during the previous financial year either—

(a) he was assessed to income tax, or was in the Province assessed in respect of any direct municipal or direct cantonment tax to an amount of not less than fifty rupees; or

(b) he was in the Province assessed to haisiyat or profession tax to an amount of not less than two rupees, or, in districts in which no such tax exists, to any other direct tax imposed under the Punjab District Boards Act to an amount of not less than two rupees.

Qualifications dependent on property, etc.

3. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he either—

(a) is the owner of land in the Province assessed to land revenue of not less than five rupees per annum; or

(b) is a tenant with a right of occupancy as defined in Chapter II of the Punjab Tenancy Act, 1887, in respect of land in the Province assessed to land revenue of not less than five rupees per annum; or

(c) is an assignee of land revenue in the Province amounting to not less than ten rupees per annum; or

(d) is a tenant of not less than six acres of irrigated land in the constituency, or of not less than twelve acres of unirrigated land in the constituency; or

(e) has throughout the twelve months immediately preceding the prescribed date owned immovable property in the Province of the value of not less than two thousand

rupees or of an annual rental value of not less than sixty rupees, not being land assessed to land revenue; or

(*f*) has throughout the twelve months preceding the prescribed date occupied as tenant in the constituency immovable property of an annual rental value of not less than sixty rupees, not being land assessed to land revenue; or

(*g*) is a zaildar, inamdar, sufedposh or lambardar in the constituency:

Provided that the provisions of sub-paragraph (*d*) of this paragraph shall be deemed to be complied with in the case of a person who is the tenant of both irrigated and unirrigated land in the constituency if the sum of the area of that irrigated land and half the area of that unirrigated land is not less than six acres.

Educational qualification

4. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is proved in the prescribed manner to have attained the primary or an equivalent or higher educational standard.

Qualification by reason of service in His Majesty's forces

5. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier in His Majesty's regular military forces.

Additional qualification for women

6. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency if she is the pensioned widow or the pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces, or if she is shown in the prescribed manner to be literate or if her husband possesses the qualifications requisite for the purposes of this paragraph.

7. A husband shall be deemed to possess the qualifications requisite for the purposes of the last preceding paragraph if he either—

(*a*) during the previous financial year was assessed to income tax, or was assessed in the Province in respect of any direct municipal or cantonment tax to an amount of not less than fifty rupees; or

(*b*) is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces; or

(c) has throughout the twelve months preceding the prescribed date owned immovable property in the Province of the value of not less than four thousand rupees or of an annual rental value of not less than ninety-six rupees, not being land assessed to land revenue ; or

(d) has throughout the twelve months preceding the prescribed date occupied as a tenant immovable property in the constituency of an annual rental value of not less than ninety-six rupees, not being land assessed to land revenue ; or

(e) is the owner of land in the Province assessed to land revenue of not less than twenty-five rupees per annum ; or

(f) is the assignee of land revenue in the Province amounting to not less than fifty rupees per annum ; or

(g) is a tenant or lessee under the terms of a lease for a period of not less than three years of Crown land in the constituency for which an annual rent of not less than twenty-five rupees is payable ; or

(h) is a tenant with a right of occupancy as defined in Chapter II of the Punjab Tenancy Act, 1887, in respect of land assessed to land revenue of not less than twenty-five rupees per annum :

Provided that for the purposes of sub-paragraph (g) of this paragraph, where the amount payable by any tenant or lessee is assessed from harvest to harvest, the annual rent payable by him shall be deemed to be the annual average of the amounts payable by him in the three years preceding that in which the prescribed date falls.

Special qualification for scheduled castes

8. Subject as aforesaid, a person who is a member of the scheduled castes shall also be qualified to be included in the electoral roll for any territorial constituency if he either—

(a) is shown in the prescribed manner to be literate ; or

(b) has throughout the twelve months preceding the prescribed date owned immovable property in the Province of a value of not less than fifty rupees, not being land assessed to land revenue, or has throughout that period owned malba of a house in the Province of not less than that value ; or

(c) has, throughout the twelve months preceding the prescribed date, occupied as tenant immovable property in the constituency of an annual rental value of not less than thirty-six rupees.

Application necessary for enrolment in certain cases

9. No person shall, by virtue of paragraph four, paragraph six or sub-paragraph (a) of paragraph eight of this Part of this

Schedule, be included in the electoral roll for any territorial constituency unless application is made by him in the prescribed manner that he should be so included.

Interpretation, etc.

10.—(1) In this Schedule, in relation to the Punjab—

'annual rental value' in relation to immovable property means the amount for which the property together with its appurtenances and furniture, if any, is actually let, or may reasonably be expected to let, from year to year;

'land revenue' means land revenue as defined in subsection (6) of section three of the Punjab Land Revenue Act, 1887, and, in the case of fluctuating land revenue or land revenue assessed on land subject to river action, the annual amount thereof shall be taken to be the average amount of land revenue paid during the three agricultural years preceding that in which the prescribed date falls;

'land records' means attested records of rights or attested annual records of rights maintained under Chapter IV of the Punjab Land Revenue Act, 1887, and includes an order finally sanctioning a mutation duly passed under that Chapter;

'agricultural year' means a year ending on the thirtieth day of September;

'owner' does not include a mortgagee;

'tenant' in relation to agricultural land means a tenant as defined in the Punjab Tenancy Act, 1887, and in relation to other property means a person who holds that property by lease and is, or, but for a special contract, would be, liable to pay rent therefor, and in relation to a house not situate in military or police lines includes any person occupying the house rent free by virtue of any office, service or employment;

'zaildar,' 'inamdar,' 'sufedposh' and 'lambardar' mean respectively persons appointed as such in accordance with rules for the time being in force under the Punjab Land Revenue Act, 1887, and do not include a substitute appointed temporarily for any such person.

(2) In computing for the purposes of this Part of this Schedule the period during which a person has owned any immovable property, any period during which it was owned by a person from whom he derives title by inheritance shall be taken into account.

(3) Any reference to immovable property, not being land assessed to land revenue, includes a reference to any building situated on land assessed to land revenue.

(4) Where property is held or payments are made by, or assessments are made on, the members of a Hindu joint family, and the respective shares of the members of the family are not specified in the land records or in any municipal or cantonment record or in a decree of a civil court, as the case may be, the family shall be adopted as the unit for deciding whether the requisite qualification exists, and, if it does exist, the person qualified shall be the manager of the family.

(5) Subject to the provisions of the last preceding sub-paragraph, any reference in this Schedule to land assessed to land revenue, to other immovable property, to a tenancy or lease of land assessed to land revenue or to assigned land revenue shall, in relation to any persons who are co-sharers in such land, property, tenancy or lease, or land revenue, be construed as a reference to the respective shares of those persons:

Provided that the share of any person under the age of twenty-one years shall, if his father is alive and a co-sharer, be deemed to be added to the share of his father, and, if his father is dead and his eldest surviving brother is a co-sharer, be deemed to be added to the share of that brother.

(6) Not more than one person shall be qualified in respect of the occupation of a building occupied in common by two or more persons and any question which of those persons is to be qualified shall be determined in the prescribed manner.

PART VII

BIHAR

General requirement as to residence

1.—(1) No person shall be qualified to be included in the electoral roll for a territorial constituency unless he resides in the constituency.

(2) A person shall be deemed to reside within a constituency if he ordinarily lives therein, or has his family dwelling therein which he occasionally occupies, or maintains therein a dwelling-house ready for occupation which he occasionally occupies.

Qualifications dependent on taxation

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for a territorial constituency if he was assessed during the previous financial year to income tax or was, in the previous financial year, assessed to an aggregate amount of not less than one rupee eight annas in respect of municipal tax or is assessed, otherwise than in the Santal Parganas, to chaukidari tax of an annual amount of not less than nine annas, *or in the case of a member of the scheduled castes, of an annual amount of not less than six annas.*

Provided that, in relation to the original preparation of electoral rolls and revisions thereof within three years from the commencement of Part III of this Act, this paragraph shall have effect as if there were substituted for the reference to nine annas a reference to twelve annas.

Qualifications dependent on property

3. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll of any territorial constituency if he either—

(*a*) occupies land or buildings situate in the notified area of Jamshedpur in respect of which he is liable to pay an annual rent of not less than twenty-four rupees ; or

(*b*) holds land in the Province, not situated in the notified area of Jamshedpur or an area in which municipal tax or chaukidari tax is levied, for which he is liable to pay a rent of not less than six rupees per annum or a local cess of not less than three annas :

Provided that in relation to land within the Santal Parganas this paragraph shall have effect as if there were substituted for the reference to six rupees, in relation to the original preparation of electoral rolls and revisions thereof within three years from the commencement of Part III of this Act, a reference to five rupees, and thereafter a reference to three rupees eight annas.

Educational qualification

4. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is proved, in the prescribed manner, to have passed the matriculation examination of any prescribed university or an examination prescribed as at least equivalent to any such examination or, if it is so prescribed, any other prescribed examination not lower than a final middle school examination.

Qualification by reason of service in His Majesty's forces

5. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces.

Additional qualification for women

6. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency if she is the pensioned widow or pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces, or if her husband possesses

the qualifications requisite for the purposes of this paragraph, or if she is shown in the prescribed manner to be literate :

Provided that, in relation to the original preparation of electoral rolls and revisions thereof within three years from the commencement of Part III of this Act, this paragraph shall have effect as if the words 'or if she is shown in the prescribed manner to be literate' were omitted therefrom.

7. A husband shall be deemed to possess the qualifications requisite for the purposes of the last preceding paragraph if—

(a) in the previous financial year he was assessed to income tax ; or

(b) he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces ; or

(c) he was in the previous financial year assessed in the Province to an aggregate amount of not less than three rupees in respect of municipal tax ; or

(d) he is assessed in the Province, otherwise than in the Santal Parganas, to an annual sum of not less than two rupees eight annas in respect of chaukidari tax ; or

(e) he occupies land or buildings situate in the notified area of Jamshedpur in respect of which he is liable to pay rent of not less than one hundred and forty-four rupees per annum ; or

(f) he holds land in the Province, not situated in the notified area of Jamshedpur or an area in which municipal tax or chaukidari tax is levied, in respect of which he is liable to pay rent of not less than twenty-four rupees per annum or a local cess of not less than twelve annas.

Special provisions as to Muhammadan women's constituency

8. No man shall be included in the electoral roll for, or be entitled to vote at any election in, any Muhammadan constituency specially formed for the election of a person to fill the seat reserved for women.

Interpretation, etc.

9.—(1) In this Schedule, in relation to Bihar—

'municipal tax' means a tax or rate levied in a municipality constituted under the Bihar and Orissa Municipal Act, 1922, in an area in respect of which a notification has issued under section three hundred and eighty-eight of that Act, or in a cantonment, or in the area administered by the Patna Administration Committee ;

'chaukidari tax' means any tax levied under the Village Chaukidari Act, 1870, the Chota Nagpur Rural Police

Act, 1914, or section thirty of the Bihar and Orissa Village Administration Act, 1922.

(2) Where property is held or payments are made jointly by, or assessments are made jointly on, the members of a joint family, the family shall be adopted as the unit for deciding whether the requisite qualification exists and, if it does exist, the person qualified shall be, in the case of a Hindu joint family, the manager thereof, and in other cases the member authorised in that behalf by the family themselves.

(3) Where property is held or payments are made jointly by, or assessments are made jointly on, persons other than the members of a joint family, all such persons shall be regarded as a single person for deciding whether the requisite qualification exists, and if it does exist, then, subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, one and one only of those persons shall be qualified and the person to be qualified shall be selected in the prescribed manner.

Part VIII

The Central Provinces and Berar

General requirements as to residence

1.—(1) No person shall be qualified to be included in the electoral roll for a territorial constituency unless, in the case of a rural constituency, he has a place of residence in the constituency, and, in the case of an urban constituency, he has a place of residence in, or within two miles from the boundary of, the constituency.

(2) For the purposes of this Part of this Schedule a person shall be deemed to have a place of residence in an area if and only if he either—

(*a*) has actually dwelt in a house within the area for not less than one hundred and eighty days in the aggregate during the previous financial year; or

(*b*) he has maintained a house within the area for an aggregate period of not less than one hundred and eighty days during that year as a dwelling for himself in charge of his dependants or servants, and has visited that house during that year.

Qualifications dependent upon taxation

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for a territorial constituency if in the previous financial year he either—

(*a*) was assessed to income tax; or

(*b*) was, in an urban area in the Province in which a municipal tax based on haisiyat is imposed, assessed to such a tax on a haisiyat of not less than seventy-five rupees.

Qualifications dependent on property, etc.

3. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll of a territorial constituency if he either—

(a) holds, in the Central Provinces, as a proprietor or thekadar, an estate or mahal the land revenue or kamil jama of which is not less than two rupees; or
(b) holds, in the Central Provinces, as a proprietor or thekadar in proprietary right, sir land or khudkasht, or, as a malik makbuza, raiyat or tenant, agricultural land, being sir land, khudkasht or agricultural land, the assessed or assessable land revenue or the rent of which is not less than two rupees; or
(c) holds, in Berar, in other than tenancy right, agricultural land of which the assessed or assessable land revenue is not less than two rupees; or
(d) is, in an urban area in the Province, the owner or tenant of a building, the annual rental value of which is not less than six rupees; or
(e) is a watandar patel or a watandar patwari holding office, or a registered deshmukh or deshpandia or a lambardar.

Educational qualification

4. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is proved, in the prescribed manner, to have passed an examination which qualifies for admission to a course of study for a degree of the Nagpur University, or an examination prescribed as at least equivalent thereto, or, if it is so prescribed, any other prescribed examination not lower than a final middle school examination:

Provided that, in relation to a constituency in Berar, the foregoing provisions of this paragraph shall be deemed to be complied with in relation to any person if he is proved in the prescribed manner to have passed any examination in the State of Hyderabad prescribed as at least equivalent to an examination the passing of which qualifies persons under those provisions.

Qualification by reason of service in His Majesty's forces and the forces of His Exalted Highness the Nizam of Hyderabad

5.—(1) Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces.

(2) Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency in Berar if he is a retired, pensioned or discharged officer, non-com-

missioned officer or soldier of the regular forces of His Exalted Highness the Nizam of Hyderabad, or a retired, pensioned or discharged officer or man of the Hyderabad State Police.

Additional qualification for women

6.—(1) Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency—

(*a*) if she is the pensioned widow or pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces ;

(*b*) if she is proved in the prescribed manner to be literate or to be the holder of a primary school certificate ; or

(*c*) if her husband possesses the qualifications requisite for the purposes of this paragraph.

(2) Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency in Berar if she is the pensioned widow or pensioned mother of a person who was an officer, non-commissioned officer or soldier of the regular forces of His Exalted Highness the Nizam of Hyderabad, or an officer or man of the Hyderabad State Police.

7.—(1) A husband shall be deemed to possess the qualifications requisite for the purposes of the last preceding paragraph if he either—

(*a*) is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces ; or

(*b*) holds, in the Central Provinces, as a proprietor or thekadar, an estate or mahal the land revenue or kamil jama of which is not less than thirty-five rupees ; or

(*c*) holds, in the Central Provinces, as a proprietor or thekadar in proprietary right, sir land or khudkasht, or as a malik makbuza, raiyat or tenant, agricultural land, being sir land, khudkasht or agricultural land, the assessed or assessable land revenue or rent of which is not less than thirty-five rupees ; or

(*d*) holds, in Berar, in other than tenancy right, agricultural land of which the assessed or assessable land revenue is not less than thirty-five rupees ; or

(*e*) is, in an urban area, the owner or tenant of a building of which the annual rental value is not less than thirty-six rupees ; or

(*f*) was, in an urban area in which a municipal tax based on haisiyat is imposed, assessed in the previous financial year to such a tax on a haisiyat of not less than four hundred rupees.

(2) In relation to any territorial constituency in Berar, a husband shall also be deemed to possess the qualifications requisite

for the purposes of the last preceding paragraph if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of the regular forces of His Exalted Highness the Nizam of Hyderabad, or a retired, pensioned or discharged officer or man of the Hyderabad State Police.

Additional qualification for members of scheduled castes

8. Subject as aforesaid, a member of a scheduled caste shall also be qualified to be included in the electoral roll for any territorial constituency if he is a kotwar, a jaglia, or a village mahar holding office.

Application necessary for enrolment in certain cases

9. No person shall, by virtue of paragraph four of this Part of this Schedule, or by virtue of being a pensioned widow or mother, or of being literate or the holder of a primary school certificate, or of being the wife of an officer, non-commissioned officer, soldier or man of any force, be included in the electoral roll for any territorial constituency unless application is made in the prescribed manner by him or, if it is so prescribed, on his behalf, that he should be so included.

Interpretation, etc.

10.—(1) In this Schedule, in relation to the Central Provinces and Berar—

'building' means any structure or enclosure, whether used as a human dwelling or otherwise, and includes a part of a building ;

'estate,' 'mahal,' 'malik makbuza,' 'kamil jama,' 'sir land' and 'khudkasht' have the meanings respectively assigned to them in section two of the Central Provinces Land Revenue Act, 1917 ;

'estate or mahal' includes a part of an estate or a mahal ;

'lambardar' means a lambardar appointed under the provisions of the Central Provinces Land Revenue Act, 1917 ;

'land revenue' means land revenue as defined in section fifty-six of the Central Provinces Land Revenue Act, 1917, and in section forty-nine of the Berar Land Revenue Code, 1928 ;

'municipal tax' means a tax imposed under the provisions of the Central Provinces Municipalities Act, 1922, or of that Act as applied to Berar.

'proprietor' includes an inferior proprietor and a plot proprietor, but does not include a transferee of proprietary rights in possession, or a mortgagee with possession ;

'raiyat' means the holder of a survey number as defined in subsection (18) of section two of the Central Provinces Land Revenue Act, 1917, and includes the holder of land recorded in the land records maintained by the Provincial Government as milkiyat sarkar ;

'registered deshmukh or deshpandia' means a person, being a deshmukh or deshpandia, whose name is recorded in the registers of political pensions maintained by the Deputy Commissioners in Berar as the holder of a pension or share of a pension;

'rental value,' in relation to immovable property, means the amount for which the property, together with its appurtenances and furniture, if any, is actually let, or may reasonably be expected to be let, from year to year;

'tenant,' in relation to agricultural land, means a tenant as defined in subsection (11) of section two of the Central Provinces Tenancy Act, 1920, but does not include a sub-tenant, and in relation to a house not situate in military or police lines includes any person occupying the house rent free by virtue of any office, service or employment;

'thekadar' includes a gaontia and a protected headman;

'hold,' in relation to land or an estate or mahal, means to be recorded in the records maintained under Chapter V of the Central Provinces Land Revenue Act, 1917, or Chapter X of the Berar Land Revenue Code, 1928, or, in the case of the Melghat Taluq of the Amraoti District, in the land records prescribed by the Provincial Government, as the person in possession of the land, estate or mahal;

'urban area' means a municipality, notified area or cantonment, and includes the Government gun carriage factory estate at Jubbulpore and any prescribed railway settlements;

'watandar patel' and 'watandar patwari' mean respectively a patel and a patwari appointed under section five of the Berar Patels and Patwaris Law, 1900.

(2) For the purposes of this Part of this Schedule ante-alienation tenants as defined in section seventy-two of the Berar Land Revenue Code, 1928, and section forty of the Berar Alienated Villages Tenancy Law, 1921, permanent tenants as defined in section forty-seven of the Berar Alienated Villages Tenancy Law, 1921, and tenants of antiquity as defined in section seventy-three of the Berar Land Revenue Code, 1928, shall be deemed to hold agricultural land in other than tenancy right.

(3) Subject to the provisions of the next succeeding sub-paragraph, the provisions of this Part of this Schedule shall have effect in relation to any persons who are co-sharers in, or in a tenancy or lease of, land or other immovable property as if the respective shares of those persons in the land, property, tenancy or lease were held separately.

(4) Where property is held or payments are made jointly by the members of a joint family or a tax is assessed jointly on the

members of a joint family, the family shall be adopted as the unit for deciding whether the requisite qualification exists, and if it does exist, the person qualified shall be, in the case of a Hindu joint family, the manager thereof, and in other cases the member authorised in that behalf by the family themselves.

(5) Any reference in this Part of this Schedule to a retired, pensioned or discharged officer or man of the Hyderabad State Police shall be deemed not to include a reference to any person who has been dismissed or discharged from the police for disciplinary reasons.

PART IX

ASSAM

General requirement as to residence

1. No person shall be qualified to be included in the electoral roll for a territorial constituency unless he has a place of residence in the constituency, and a person shall be deemed to have a place of residence in a constituency if he ordinarily lives in the constituency or has his family dwelling place in the constituency and occasionally occupies it:

Provided that in relation to the European constituency the provisions of this paragraph shall be deemed to be complied with in relation to any person if he is actually employed anywhere in Assam but is absent from Assam on leave from his employment.

Qualifications dependent on taxation

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for any territorial constituency if, in the previous financial year, he either—

(*a*) was assessed to income tax; or

(*b*) was in the constituency assessed in respect of municipal or cantonment rates or taxes to an aggregate amount of not less than two rupees or, in the Sylhet municipality, of not less than one rupee eight annas, or to a tax of not less than one rupee in a Small Town, or, in the district of Sylhet, the district of Cachar or the district of Goalpara, to a tax of not less than eight annas under the Village Chaukidari Act, 1870.

Qualifications dependent on property

3. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if, in the constituency, he either—

(*a*) is the owner of land the land revenue on which has been assessed or is assessable at not less than seven rupees eight annas per annum; or

(b) is liable to pay a local rate of not less than eight annas per annum ; or

(c) throughout the previous financial or previous Bengali year held from a landlord land in any of the following districts, that is to say, Lakhimpur, Sibsagar, Darrang, Nowgong or Kamrup, or in the Garo Hills, and paid to the landlord rent to the value of not less than seven rupees eight annas in respect of that land :

Provided that for the purposes of this paragraph land situate, and local rates levied, in the districts of Sylhet, Cachar and Goalpara shall be left out of account.

Educational qualification

4. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is proved in the prescribed manner to have passed the middle school leaving certificate examination or any other examination prescribed as at least equivalent thereto.

Qualification by reason of service in His Majesty's forces

5. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer, or soldier of His Majesty's regular military forces or the Assam Rifles.

Additional qualification for women

6. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency if she is the pensioned widow or pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces or the Assam Rifles, or if she is proved in the prescribed manner to be literate, or if her husband possesses the qualifications requisite for the purposes of this paragraph.

7. A husband shall be deemed to possess the qualifications requisite for the purposes of the last preceding paragraph if he—

(a) is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces or the Assam Rifles ; or

(b) was in the previous financial year assessed to income tax ; or

(c) was in the previous financial year assessed in the constituency in respect of municipal or cantonment rates or taxes—

(i) in the Nowgong municipality, to not less than two rupees ; or

(ii) in the Sylhet municipality, to not less than one rupee eight annas; or

(iii) elsewhere in the Province, to not less than three rupees; or

(d) was in the constituency assessed in the previous financial year to a tax of not less than one rupee in a Small Town; or

(e) was in the constituency assessed in the previous financial year in the district of Sylhet, the district of Cachar or the district of Goalpara to a tax of not less than one rupee under the Village Chaukidari Act, 1870; or

(f) elsewhere than in the said districts, is the owner of land in the constituency, the land revenue on which has been assessed or is assessable at not less than fifteen rupees per annum; or

(g) is liable to pay a local rate in the constituency of not less than one rupee per annum.

Application necessary for enrolment in certain cases

8. No person shall, by virtue of paragraph six of this Part of this Schedule, be included in the electoral roll for any territorial constituency unless application is made in the prescribed manner by her, or, if it is so prescribed, on her behalf, that she should be so included:

Provided that, except in relation to the original preparation of electoral rolls and revisions thereof within three years from the commencement of Part III of this Act, this paragraph shall, in relation to women qualified by virtue of their husbands' qualifications, have effect only where the husband's qualification is that mentioned in sub-paragraph (a) of paragraph seven of this Part of this Schedule.

Special provisions as to seat reserved for women

9. The following provisions shall have effect in relation to any constituency specially formed for the election of persons to fill the seat reserved for women—

(a) no man shall be included in the electoral roll for the constituency, or be entitled to vote at any election therein.

Special Provisions as to Shillong

9A. In the case of any territorial constituency comprising any part of Shillong, any reference in this Part of this Schedule to 'the constituency' shall be construed as including a reference to so much of the areas under the jurisdiction of the Shillong Municipal Board and the Shillong Cantonment Authority as is not part of British India, and any reference to Municipal or cantonment rates or taxes shall be construed as including a reference to any such rates or taxes assessed

by or paid to that Board or that Authority in the exercise of any jurisdiction exercised by them in relation to areas outside British India.

Special provisions as to backward areas and backward tribes

10. No person who is entitled to vote in the election of a person to fill any of the seats to be filled by representatives of backward areas or backward tribes, or is entitled to be included in the electoral roll for any constituency formed for the purpose of filling any such seat, shall be included in the electoral roll for any territorial constituency in the province, other than any constituency specially formed for the election of persons to fill the seat reserved for women.

Interpretation, etc.

11.—(1) In this Schedule, in relation to Assam—

'Small Town' means a notified area constituted under Chapter XII of the Assam Municipal Act I of 1923;

'Bengali year' means a year ending on the last day of the Bengali month of Chaitra;

'local rate' means the local rate assessed under the Assam Local Rates Regulation, 1879;

'landlord' means a person under whom another person holds land immediately, but does not include the Government;

'rent' includes rent in kind or partly in kind.

(2) Where property is held or payments are made jointly by, or assessments are made jointly on, the members of a joint family, the family shall be adopted as the unit for deciding whether the necessary qualification exists, and if it does exist the person qualified shall be, in the case of a Hindu joint family, the manager thereof, and in other cases the member authorised in that behalf by the family themselves:

Provided that any other member of any such family shall also be qualified if the proportion of the joint property, payment or assessment which corresponds with his share therein would be sufficient for him to be qualified if he held it separately.

PART X

THE NORTH-WEST FRONTIER PROVINCE

General requirement as to residence

1. No person shall be qualified to be included in the electoral roll for any territorial constituency unless he is resident in the constituency.

For the purposes of this Part of this Schedule proof that a person or, in the case of a woman, her husband owns a family

dwelling-house or a share in a family dwelling-house in a constituency and that that house has not during the twelve months preceding the prescribed date been let on rent either in whole or in part shall be sufficient evidence that that person is resident in the constituency.

Qualifications dependent on taxation

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for any territorial constituency if during the previous financial year, he was either—

(*a*) assessed to income tax ; or

(*b*) assessed in the Province in respect of any direct municipal or cantonment tax to an amount of not less than fifty rupees ; or

(*c*) in the case of a rural constituency, assessed to district board tax of not less than two rupees.

Qualifications dependent on rights in property, etc.

3. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if, in the Province, he either—

(*a*) owned throughout the twelve months preceding the prescribed date immovable property of the value of not less than six hundred rupees, not being land assessed to land revenue ; or

(*b*) has for the twelve months preceding the prescribed date occupied as a tenant immovable property of an annual rental value of not less than forty-eight rupees, not being land assessed to land revenue ; or

(*c*) is the owner of not less than six acres irrigated land or not less than twelve acres unirrigated land or of land assessed to land revenue of not less than five rupees per annum ; or

(*d*) is the assignee of land revenue amounting to not less than ten rupees per annum ; or

(*e*) has been for the whole of the preceding fasli year the tenant of not less than six acres of irrigated land or not less than twelve acres unirrigated land ; or

(*f*) is a zaildar, inamdar or lambardar :

Provided that for the purposes of sub-paragraph (*c*) and sub-paragraph (*e*) of this paragraph a person shall be deemed to own or, as the case may be, to have been the tenant of, at least six acres of irrigated land if he owns, or, as the case may be, was the tenant of, irrigated and unirrigated land and the sum of the area of that irrigated land and half the area of that unirrigated land is not less than six acres.

Educational qualification

4. Subject as aforesaid, a person shall also be qualified to be included—

(a) in the electoral roll for any urban constituency, if he is proved in the prescribed manner to have passed a middle school examination or any other examination prescribed as at least equivalent to that examination;

(b) in the electoral roll for a rural constituency, if he is proved in the prescribed manner to have passed the primary (fourth class) examination or any other examination prescribed as at least equivalent to that examination.

Qualification by reason of service in His Majesty's forces

5. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces.

Additional qualification for women

6. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency if she is the pensioned widow or the pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces, or if her husband possesses the qualifications requisite for the purposes of this paragraph or if she is shown in the prescribed manner to be literate:

Provided that, in relation to the original preparation of electoral rolls and revisions thereof within three years from the commencement of Part III of this Act, this paragraph shall have effect as if the words 'or if she is shown in the prescribed manner to be literate' were omitted therefrom.

7. A husband shall be deemed to possess the qualifications requisite for the purposes of the last preceding paragraph if either—

(a) he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces; or

(b) he has an income of at least forty rupees per month; or

(c) he was during the previous financial year assessed to income tax; or

(d) in relation to an urban constituency, he was, during the previous financial year, assessed in the Province in respect of any direct municipal or cantonment tax to an amount of not less than fifty rupees; or

(e) in relation to a rural constituency, he was, during the preceding financial year assessed in the Province in respect of any cess, rate or tax to an amount of not less than four rupees per annum payable to the district board; or

(f) he owned throughout the twelve months preceding the prescribed date immovable property in the Province of the value of not less than six hundred rupees, not being land assessed to land revenue ; or

(g) he occupied as a tenant throughout the twelve months preceding the prescribed date immovable property in the Province of an annual rental value of not less than forty-eight rupees, not being land assessed to land revenue ; or

(h) he is the owner of land in the Province assessed to land revenue of not less than ten rupees per annum ; or

(i) he is an assignee of land revenue in the Province amounting to not less than twenty rupees per annum ; or

(j) he is a tenant or lessee, under the terms of a written lease for a period of not less than three years, of land in the Province assessed to land revenue of not less than ten rupees per annum ; or

(k) he is a tenant with a right of occupancy, as defined in Chapter II of the Punjab Tenancy Act, 1887, in respect of land in the Province assessed to land revenue of not less than ten rupees per annum.

Application necessary for enrolment in certain cases

8. No person shall, by virtue of paragraph four or paragraph six of this Part of this Schedule, be included in the electoral roll for any territorial constituency unless application is made by him in the prescribed manner that he should be so included.

Interpretation, etc.

9.—(1) In this Schedule, in relation to the North West Frontier Province—

'annual rental value,' in relation to immovable property, means the amount for which the property, together with its appurtenances and furniture, if any, is actually let, or may reasonably be expected to be let, from year to year ;

'fasli year' means a year ending on the thirtieth day of September ;

'land revenue' means land revenue as defined in sub-section (6) of section three of the Punjab Land Revenue Act, 1887, and, in the case of fluctuating land revenue or land revenue assessed on land subject to river action, the annual amount thereof shall be taken to be the average amount paid during the three years preceding the prescribed date ;

'zaildar,' 'inamdar' and 'lambardar' mean respectively persons appointed as such in accordance with rules for the time being in force under the Punjab

Land Revenue Act, 1887, and do not include a substitute appointed temporarily for any such person;

'tenant' in relation to agricultural land means a tenant as defined in the Punjab Tenancy Act, 1887, and in relation to other property, means a person who holds that property by lease and is, or, but for a special contract, would be, liable to pay rent therefor, and in relation to a house not situate in military or police lines includes any person occupying the house rent free by virtue of any office, service or employment.

(2) In computing for the purposes of this Part of this Schedule the period during which a person has owned any immovable property, any period during which it was owned by a person from whom he derives title by inheritance shall be taken into account.

(3) Any reference to immovable property, not being land assessed to land revenue, includes a reference to any building situated on land assessed to land revenue.

(4) Where property is held or payments are made jointly by, or assessments are made jointly on, the members of a joint family, the family shall be adopted as the unit for deciding whether the requisite qualification exists and, if it does exist, the person qualified shall be, in the case of a Hindu joint family the manager thereof, and in other cases the member authorized in that behalf by the family themselves.

(5) Subject to the provisions of the last preceding sub-paragraph, any reference in this Schedule to land assessed to land revenue, to other immovable property, to a tenancy or lease of land assessed to land revenue or to assigned land revenue, shall, in relation to any persons who are co-sharers in such land, property, tenancy or lease, or land revenue, be construed as a reference to the respective shares of those persons:

Provided that the share of any person under the age of twenty-one years shall, if his father is alive and a co-sharer, be deemed to be added to the share of his father, and, if his father is dead and his eldest surviving brother is a co-sharer, be deemed to be added to the share of that brother.

PART XI

In Part XI of the Sixth Schedule to the Act, references to the Vizagapatam district, the sub-division of Angul and Khondmals sub-division shall be construed as references to the Koraput district, the Angul district and the Khondmals district respectively.

ORISSA

General requirements as to residence

1. No person shall be qualified to be included in the electoral roll for a territorial constituency unless he is resident in the constituency, and a person shall be deemed to be resident within a

constituency if he ordinarily lives therein or has his family dwelling therein which he occasionally occupies, or maintains therein a dwelling-house ready for occupation which he occasionally occupies.

Qualifications applicable to all territorial constituencies

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for any territorial constituency if in the previous financial year he was assessed to income tax, or was assessed to an aggregate amount of not less than one rupee, eight annas, in respect of municipal taxes.

3. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is proved, in the prescribed manner, to have passed the matriculation examination of any prescribed university or an examination prescribed as at least equivalent to any such examination, or if it is so prescribed, any other prescribed examination not lower than a final middle school examination.

4. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces.

5. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency—

(*a*) if she is the pensioned widow or pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces ; or

(*b*) if her husband either is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces, or in the previous financial year was assessed to income tax or to an aggregate sum of not less than three rupees in respect of municipal taxes ; or

(*c*) if she is shown in the prescribed manner to be literate :

Provided that, in relation to the original preparation of electoral rolls and revisions thereof within three years from the commencement of Part III of this Act, this paragraph shall have effect as if sub-paragraph (*c*) were omitted therefrom.

Special provisions as to the districts of Cuttack, Puri, Balasore and the sub-division of Angul

6. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for a constituency situated wholly or partly in the districts of Cuttack, Puri and Balasore and the sub-division of Angul if he either—

(*a*) is assessed to chaukidari tax of an annual amount of not less than nine annas ; or

(b) holds land in the Province, not situated in a municipality or an area in which chaukidari tax is levied, for which he is liable to pay rent or land revenue of not less than two rupees per annum or a local cess of not less than one anna :

Provided that, in relation to the original preparation of electoral rolls and revisions thereof within three years from the commencement of Part III of this Act, this paragraph shall have effect as if there were substituted for the reference to nine annas a reference to twelve annas.

7. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any such constituency as is mentioned in the last preceding paragraph if she is the wife of any person who either—

(a) is assessed to chaukidari tax of an annual amount of not less than two rupees, eight annas ; or

(b) holds land in the Province, not situated in a municipality or in an area in which chaukidari tax is levied, for which he is liable to pay rent or land revenue of not less than sixteen rupees per annum or local cess of not less than eight annas.

Special provisions as to the districts of Ganjam and Vizagapatam and the Khondmals sub-division

8. Subject as aforesaid, a person, not being a member of a backward tribe, shall also be qualified to be included in the electoral roll for a constituency situated wholly or partly in the districts of Ganjam and Vizagapatam or in the Khondmals sub-division—

(a) if in either of those districts or in that sub-division he holds land, not situate in a municipality, in respect of which he is liable to pay rent or land revenue of not less than two rupees per annum ; or

(b) *if he is a member of the scheduled castes and is not a village servant, whether hereditary or not ; or*

(c) without prejudice to the generality of the foregoing provisions, if, being a woman, she is the wife of a person who in either of those districts or in that sub-division holds land, not situate in a municipality, in respect of which he is liable to pay rent or land revenue of not less than sixteen rupees per annum.

Special provision as to the district of Sambalpur

9. Subject as aforesaid, a person shall be qualified to be included in the electoral roll for any constituency situated wholly or partly in the district of Sambalpur if, in that district, he either—

(a) holds land, not situated in a municipality or a sanitation area, for which he is liable to pay rent or land revenue

of not less than one rupee per annum or village cess of not less than one anna; or

(b) is in occupation of a house for which he is liable to pay rent of not less than six rupees per annum, not being a house in a municipality or sanitation area; or

(c) is assessed to an annual tax of at least twelve annas under the Central Provinces Sanitation Act, 1902, or the Central Provinces Village Sanitation and Public Management Act, 1920; or

(d) is a village servant holding office as a jhankar, ganda, kotwar, jagalia or mahar, and holds land recorded in the record of rights as service land:

Provided that, in relation to the original preparation of electoral rolls and revisions thereof within three years from the commencement of Part III of this Act, this paragraph shall have effect as if for the references in sub-paragraph (a) thereof to one rupee and one anna there were substituted respectively references to two upees and two annas.

10. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for a constituency situated wholly or partly in the district of Sambalpur if she is the wife of a person who, in that district, either—

(a) holds land not situated in a municipality or a sanitation area, for which he is liable to pay rent or land revenue of not less than sixteen rupees per annum or village cess of not less than eight annas; or

(b) is in occupation of a house for which he is liable to pay an annual rent of not less than thirty rupees, not being a house in a municipality or sanitation area; or

(c) is assessed to an annual tax of not less than ten rupees under the Central Provinces Sanitation Act, 1902, or the Central Provinces Village Sanitation and Public Management Act, 1920.

Interpretation, etc.

11.—(1) In this Schedule, in relation to Orissa—

'backward tribe' has the same meaning as in the Fifth Schedule to this Act;

'municipality' means an area constituted a municipality under the Bihar and Orissa Municipal Act, 1922, or the Madras District Municipalities Act, 1920, or an area in respect of which a notification has issued under section three hundred and eighty-eight of the Bihar and Orissa Municipal Act, 1922;

'municipal tax' means a tax or rate levied in a municipality;

'sanitation area' means an area administered under the Central Provinces Village Sanitation Act, 1902, or the

Central Provinces Village Sanitation and Public Management Act, 1920 ;

'chaukidari tax' means a tax levied under the Village Chaukidari Act, 1870, under section thirty of the Bihar and Orissa Village Administration Act, 1922, or under section forty-seven of the Angul Laws Regulation, 1913.

(2) Where property is held or payments are made jointly by, or assessments made jointly on, the members of a joint family, the family shall be adopted as the unit for deciding whether the requisite qualification exists, and if it does exist the person qualified shall be, in the case of a Hindu joint family, the manager thereof, and in other cases the member authorized in that behalf by the family themselves.

(3) Where property is held or payments are made jointly by, or assessments are made jointly on, persons other than the members of a joint family, all such persons shall be regarded as a single person for deciding whether the requisite qualification exists, and if it does exist, then, subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule one and one only of those persons shall be qualified, and the persons to be qualified shall be selected in the prescribed manner.

Part XII

Sind

General requirement as to residence

1. No person shall be qualified to be included in the electoral roll for a territorial constituency unless he satisfies the requirement as to residence in relation to that constituency.

For the purposes of this Part of this Schedule a person shall be deemed to satisfy the requirement as to residence—

(*a*) in relation to an urban constituency, if he has for a period of not less than one hundred and eighty days in the previous financial year resided in a house in the constituency or within two miles of the boundary thereof;

(*b*) in the case of a rural constituency, if he has for a period of not less than one hundred and eighty days in the previous financial year resided in a house in the constituency or in a contiguous constituency of the same communal description :

Provided that a person shall be deemed to satisfy the requirement as to residence in relation to any European territorial constituency if he has, for a period of not less than one hundred and eighty days in the previous financial year, resided in a house in the Province.

A person is deemed to reside in a house if he sometimes uses it as a sleeping place, and a person is not deemed to cease to reside

in a house merely because he is absent from it, or has another dwelling in which he resides, if he is at liberty to return to the house at any time and has not abandoned his intention of returning.

Qualifications dependent on taxation

2. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person shall be qualified to be included in the electoral roll for any territorial constituency, if he was assessed during the previous financial year to income tax.

Qualifications dependent on property

3. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he—

(*a*) holds in his own right or occupies as a permanent tenant or as a lessee from the Government alienated or unalienated land in the constituency on which, in any one of the five revenue years preceding that in which the prescribed date falls, an assessment of not less than eight rupees land revenue has been paid, or would have been paid if the land had not been alienated ; or

(*b*) cultivates as a Hari alienated or unalienated land in the constituency on which in the revenue year preceding that in which the prescribed date falls an assessment of not less than sixteen rupees land revenue has been leviable, or would have been leviable if the land had not been alienated ; or

(*c*) is the alienee of the right of the Government to the payment of rent or land revenue amounting to not less than eight rupees in respect of alienated land in the constituency ; or

(*d*) occupies as owner or tenant in the constituency a house or building situate in the city of Karachi or in any municipal borough, municipal district, cantonment or notified area, and having at least the appropriate value.

Where land is cultivated by more than one Hari, only one Hari for every sixteen rupees of land revenue shall be treated as qualified under sub-paragraph (*b*) of this paragraph in respect of that land, and any question which of several Haris shall be treated as qualified under this paragraph in respect of any land shall be determined in the prescribed manner.

In sub-paragraph (*d*) of this paragraph, the expression 'the appropriate value' means—

(i) in relation to a house or building situate within the city of Karachi, an annual rental value of thirty rupees ;

(ii) in relation to a house or building situate outside the city of Karachi but in an area in which a tax is based on

the annual rental value of houses or buildings, an annual rental value of eighteen rupees ;

(iii) in relation to any other house or building, a capital value of seven hundred and fifty rupees.

Educational qualification

4. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is proved in the prescribed manner to have passed the matriculation or school leaving examination of the university of Bombay or an examination prescribed as at least equivalent to either of those examinations or, if it is so prescribed, any other prescribed examination, not being lower than a vernacular final examination.

Qualification by reason of service in His Majesty's forces

5. Subject as aforesaid, a person shall also be qualified to be included in the electoral roll for any territorial constituency if he is a retired, pensioned or discharged officer, non-commissioned officer or soldier of His Majesty's regular military forces.

Additional qualification for women

6. Subject as aforesaid, a person who is a woman shall also be qualified to be included in the electoral roll for any territorial constituency, if she is the pensioned widow or the pensioned mother of a person who was an officer, non-commissioned officer or soldier of His Majesty's regular military forces, or if she is proved in the prescribed manner to be literate, or if her husband possesses the qualifications requisite for the purposes of this paragraph.

7. A husband shall not be deemed to possess the qualifications requisite for the purposes of the last preceding paragraph unless he satisfies the requirement as to residence in relation to the constituency in question, but, subject as aforesaid a husband shall be deemed to possess the said qualifications if he—

(*a*) was in the previous financial year assessed to income tax ; or

(*b*) is a retired, pensioned or discharged officer, non-commissioned officer, or soldier of His Majesty's regular military forces ; or

(*c*) holds in his own right or occupies as a permanent tenant or as a lessee from the Government alienated or unalienated land in the constituency on which, in any one of the five revenue years preceding that in which the prescribed date falls, an assessment of land revenue amounting, in the Upper Sind Frontier district, to not less than sixteen rupees, and, elsewhere, to not less than thirty-two rupees, has been paid, or would have been paid if the land had not been alienated ; or

(d) is the alience of the right of the Government to the payment of rent or land revenue in respect of alienated land in the constituency, amounting, in the Upper Sind Frontier district, to not less than sixteen rupees, and, elsewhere, to not less than thirty-two rupees ; or

(e) occupies as owner or tenant in the constituency a house or building situate in the city of Karachi or in a municipal borough, municipal district, cantonment or notified area, and having at least the appropriate value.

In sub-paragraph (e) of this paragraph, the expression 'appropriate value' means—

(i) in relation to a house or building within the city of Karachi, an annual rental value of sixty rupees ;

(ii) in relation to a house or building situate in any other area in which any tax is based on the annual rental value of houses or buildings, an annual rental value of thirty-six rupees ; and

(iii) in relation to any other house or building, a capital value of one thousand five hundred rupees.

Application necessary for enrolment in certain cases

8. No person shall by virtue of paragraph four or paragraph six of this Part of this Schedule be included in the electoral roll for any territorial constituency unless application is made in the prescribed manner by him, or, if it is so prescribed, on his behalf that he should be so included.

Provisions as to joint property, etc.

9.—(1) Subject to the provisions of this paragraph, any reference in this Part of this Schedule to land or other immovable property, or to rent or land revenue in respect of alienated land, shall, in relation to any persons who are co-sharers in such land, property, rent or land revenue, be construed as a reference to the respective shares of those persons.

(2) Where two or more persons occupy any house, the rental value of the house shall, in relation to each of those persons, be deemed to be the rental value thereof divided by the number of those persons.

(3) Where property is owned, held or occupied, or payments are made, jointly by, or assessments are made jointly on, the members of a joint family, and the property, payments or assessments would qualify a person if they had been owned, held, occupied or made by or on him solely, then, subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, one member of the family shall be qualified in respect of the property, payment or assessment, and that person shall be, in

the case of a Hindu joint family, the manager thereof and in other cases the member authorized in that behalf by the family themselves.

Save as aforesaid any property owned, held or occupied or payments made jointly by, or assessments made jointly on, the members of a joint family, shall be left out of account for the purposes of this Part of this Schedule.

(4) Nothing in this paragraph affects the provisions of Part I of this Schedule relating to partners in firms assessed to income tax or the provisions of this Part of this Schedule relating to Haris.

Interpretation, etc.

10.—(1) In this Schedule, in relation to Sind—

'tenant' means a lessee whether holding under an Instrument or under an oral agreement, and includes a mortgagee of a tenant's rights with possession, and, in relation to a house not situate in military or police lines, also includes any person occupying the house rent free by virtue of any office, service or employment;

'holder' means a person lawfully in possession of land, whether his possession is actual or not, and 'hold' shall be construed accordingly.

(2) The value of any machinery, furniture or equipment contained in or situate upon any house or building shall not be included in estimating for the purposes of this Part of this Schedule the rental value or the capital value of the house or building.

(3) In computing for the purposes of this Part of this Schedule the assessable value of any land, regard shall be had to the average rate of assessment on assessed land in the same village or, if there is no such land in the same village, the average rate of assessment on assessed land in the nearest village containing assessed land.

Sections 100, 104

SEVENTH SCHEDULE

Legislative Lists

List I

Federal Legislative List

1. His Majesty's naval, military and air forces borne on the Indian establishment and any other armed force raised in India by the Crown, not being forces raised for employment in Indian States or military or armed police maintained by Provincial Governments; any armed forces which are not forces of His Majesty, but are attached to or operating with any of His Majesty's naval, military or air forces borne on the Indian establishment; central intelligence bureau; preventive detention in British India for

reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States.

2. Naval, military and air force works; local self-government in cantonment areas (not being cantonment areas of Indian State troops), the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas.

3. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.

4. Ecclesiastical affairs, including European cemeteries.

5. Currency, coinage and legal tender.

6. Public debt of the Federation.

7. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication; Post Office Savings Bank.

8. Federal Public Services and Federal Public Service Commission.

9. Federal pensions, that is to say, pensions payable by the Federation or out of Federal revenues.

10. Works, lands and buildings vested in, or in the possession of, His Majesty for the purposes of the Federation (not being naval, military or air force works), but, as regards property situate in a Province, subject always to Provincial legislation, save in so far as Federal law otherwise provides, and, as regards property in a Federated State held by virtue of any lease or agreement with that State, subject to the terms of that lease or agreement.

11. The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial, and any similar institution controlled or financed by the Federation.

12. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training or for the promotion of special studies.

13. The Benares Hindu University and the Aligarh Muslim University.

14. The Survey of India, the Geological, Botanical and Zoological Surveys of India; Federal meteorological organizations.

15. Ancient and historical monuments; archæological sites and remains.

16. Census.

17. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in

India of persons who are not British subjects domiciled in India, subjects of any Federated State, or British subjects domiciled in the United Kingdom ; pilgrimages to places beyond India.

18. Port quarantine ; seamen's and marine hospitals, and hospitals connected with port quarantine.

19. Import and export across customs frontiers as defined by the Federal Government.

20. Federal railways ; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers ; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

21. Maritime shipping and navigation, including shipping and navigation on tidal waters ; Admiralty jurisdiction.

22. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

23. Fishing and fisheries beyond territorial waters.

24. Aircraft and air navigation ; the provision of aerodromes ; regulation and organization of air traffic and of aerodromes.

25. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

26. Carriage of passengers and goods by sea or by air.

27. Copyright, inventions, designs, trademarks and merchandise marks.

28. Cheques, bills of exchange, promissory notes and other like instruments.

29. Arms ; firearms ; ammunition.

30. Explosives.

31. Opium, so far as regards cultivation and manufacture, or sale for export.

32. Petroleum and other liquids and substances declared by Federal law to be dangerously inflammable, so far as regards possession, storage and transport.

33. Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co-operative societies, and of corporations, whether trading or not, with objects not confined to one unit.

34. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest.

35. Regulation of labour and safety in mines and oilfields.

36. Regulation of mines and oilfields and mineral development to the extent to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest.

37. The law of insurance, except as respects insurance undertaken by a Federated State, and the regulation of the conduct of insurance business, except as respects business undertaken by a Federated State; Government insurance, except so far as undertaken by a Federated State, or, by virtue of any entry in the Provincial Legislative List or the Concurrent Legislative List, by a Province.

38. Banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Federated State and carrying on business only within that State.

39. Extension of the powers and jurisdiction of members of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner's Province, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Chief Commissioner, as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.

40. Elections to the Federal Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

41. The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly; the salaries, allowances and privileges of the members of the Federal Legislature; and, to such extent as is expressly authorized by Part II of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature.

42. Offences against laws with respect to any of the matters in this list.

43. Inquiries and statistics for the purposes of any of the matters in this list.

44. Duties of customs, including export duties.

45. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;
(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(*c*) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (*b*) of this entry.

46. Corporation tax.

47. Salt.

48. State lotteries.

49. Naturalization.

50. Migration within India from or into a Governor's Province or a Chief Commissioner's Province.

51. Establishment of standards of weight.

52. Ranchi European Mental Hospital.

53. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorized by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers.

54. Taxes on income other than agricultural income.

55. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies ; taxes on the capital of companies.

56. Duties in respect of succession to property other than agricultural land.

57. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.

58. Terminal taxes on goods or passengers carried by railway or air ; taxes on railway fares and freights.

59. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

List II

Provincial Legislative List

1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power) ; the administration of justice ; constitution and organization of all courts, except the Federal Court, and fees taken therein ; preventive detention for reasons connected with the maintenance of public order ; persons subjected to such detention.

2. Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list ; procedure in Rent and Revenue Courts.

3. Police, including railway and village police.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein ; arrangements with other units for the use of prisons and other institutions.

5. Public debt of the Province.

6. Provincial Public Services and Provincial Public Service Commissions.

7. Provincial pensions, that is to say, pensions payable by the Province or out of Provincial revenues.

8. Works, lands and buildings vested in or in the possession of His Majesty for the purposes of the Province.

9. Compulsory acquisition of land.

10. Libraries, museums and other similar institutions controlled or financed by the Province.

11. Elections to the Provincial Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

12. The salaries of the Provincial Ministers, of the Speaker and Deputy Speaker of the Legislative Assembly, and, if there is a Legislative Council, of the President and Deputy President thereof; the salaries, allowances and privileges of the members of the Provincial Legislature ; and, to such extent as is expressly authorized by Part III of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Provincial Legislature.

13. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.[1]

14. Public health and sanitation ; hospitals and dispensaries ; registration of births and deaths.

15. Pilgrimages, other than pilgrimages to places beyond India.

16. Burials and burial grounds.

17. Education.

18. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I ; minor railways subject to the provisions of List I with respect to such railways ; municipal tramways ; ropeways ; inland waterways and traffic thereon subject to the provisions of List III with regard to such waterways ; ports, subject to the provisions in List I with

[1] But see Local Government defined in s. 311 (2).

regard to major ports ; vehicles other than mechanically propelled vehicles.

19. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power.

20. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases ; improvement of stock and prevention of animal diseases ; veterinary training and practice ; pounds and the prevention of cattle trespass.

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents ; transfer, alienation and devolution of agricultural land ; land improvement and agricultural loans ; colonization ; Courts of Wards ; encumbered and attached estates ; treasure trove.

22. Forests.

23. Regulation of mines and oilfields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control.

24. Fisheries.

25. Protection of wild birds and wild animals.

26. Gas and gasworks.

27. Trade and commerce within the Province ; markets and fairs ; money lending and money lenders.

28. Inns and innkeepers.

29. Production, supply and distribution of goods ; development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control.

30. Adulteration of foodstuffs and other goods ; weights and measures.

31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.

32. Relief of the poor ; unemployment.

33. The incorporation, regulation, and winding-up of corporations other than corporations specified in List I ; unincorporated trading, literary, scientific, religious and other societies and associations ; co-operative societies.

34. Charities and charitable institutions ; charitable and religious endowments.

35. Theatres, dramatic performances and cinemas, but not including the sanction of cinematograph films for exhibition.

36. Betting and gambling.

37. Offences against laws with respect of any of the matters in this list.

38. Inquiries and statistics for the purpose of any of the matters in this list.

39. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenue.

40. Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(*a*) alcoholic liquors for human consumption ;
(*b*) opium, Indian hemp and other narcotic drugs and narcotics ; non-narcotic drugs ;
(*c*) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of this entry.

41. Taxes on agricultural income.

42. Taxes on lands and buildings, hearths and windows.

43. Duties in respect of succession to agricultural land.

44. Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.

45. Capitation taxes.

46. Taxes on professions, trades, callings and employments.

47. Taxes on animals and boats.

48. Taxes on the sale of goods and on advertisements.

49. Cesses on the entry of goods into a local area for consumption, use or sale therein.

50. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

51. The rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

52. Dues on passengers and goods carried on inland waterways.

53. Tolls.

54. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

List III

Concurrent Legislative List

Part I

1. Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of His Majesty's naval, military and air forces in aid of the civil power.

2. Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

3. Removal of prisoners and accused persons from one unit to another unit.

4. Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act; the recovery in a Governor's Province or a Chief Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

5. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.

6. Marriage and divorce; infants and minors; adoption.

7. Wills, intestacy, and succession, save as regards agricultural land.

8. Transfer of property other than agricultural land; registration of deeds and documents.

9. Trusts and Trustees.

10. Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

11. Arbitration.

12. Bankruptcy and insolvency; administrators-general and official trustees.

13. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

14. Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in List I or List II.

15. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list.

16. Legal, medical and other professions.

17. Newspapers, books and printing presses.

18. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

19. Poisons and dangerous drugs.

20. Mechanically propelled vehicles.

21. Boilers.

22. Prevention of cruelty to animals.

23. European vagrancy ; criminal tribes.

24. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

25. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

PART II

26. Factories. Section 126 (2)

27. Welfare of labour ; conditions of labour ; provident funds ; employers' liability and workmen's compensation ; health insurance, including invalidity pensions ; old age pensions.

28. Unemployment insurance.

29. Trade unions ; industrial and labour disputes.

30. The prevention of the extension from one unit to another of infectious or contagious diseases or pests affecting men, animals or plants.

31. Electricity.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways ; carriage of passengers and goods on inland waterways.

33. The sanctioning of cinematograph films for exhibition.

34. Persons subjected to preventive detention under Federal authority.

35. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

36. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

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EIGHTH SCHEDULE

The Federal Railway Authority

1. The Federal Railway Authority, which shall be a body corporate by, and may sue and be sued in, that name, (in this Schedule referred to as 'the Authority') shall consist of seven persons to be appointed by the Governor-General.

2. A person shall not be qualified to be appointed or to be a member of the Authority—

(*a*) unless he has had experience in commerce, industry, agriculture, finance, or administration ; or

(*b*) if he is, or within the twelve months last preceding has been

(i) a member of the Federal or any Provincial Legislature ; or

(ii) in the service of the Crown in India ; or

(iii) a railway official in India.

3. Of the first members of the Authority, three shall be appointed for three years and any of those members shall at the expiration of his original term of office be eligible for re-appointment for a further term of three years, or of five years.

Subject as aforesaid, a member of the Authority shall be appointed for five years and shall at the expiration of his original term of office be eligible for re-appointment for a further term not exceeding five years.

The Governor-General, exercising his individual judgment, may terminate the appointment of any member if satisfied that that member is for any reason unable or unfit to continue to perform the duties of his office.

4. The Governor-General, exercising his individual judgment, may make rules providing for the appointment of temporary members to act in place of any members temporarily unable to perform the duties of their office.

5. A member of the Authority shall be entitled to receive such salary and allowances as the Governor-General, exercising his individual judgment, may determine :

Provided that the emoluments of a member shall not be reduced during his term of office.

6. All acts of the Authority and all questions before them shall be done and decided by a majority of the members present and voting at a meeting of the Authority.

In the case of an equality of votes at any meeting, the person presiding thereat shall have a second or casting vote.

7. If a member of the Authority is or becomes the holder of or tenders for any contract for the supply of materials to, or the

execution of works for, any railway in India, or is or becomes concerned in the management of any company holding or tendering for such a contract as aforesaid, he shall forthwith make full disclosure of the facts to the Authority and shall not take part in the consideration or discussion of, or vote on, any question with respect to the contract.

8. At any meeting of the Authority a person or persons deputed by the Governor-General to represent him may attend and speak, but not vote.

9. Subject to the provisions of this Act, the Authority may make standing orders for the regulation of their proceedings and business, and may vary or revoke any such order.

10. The proceedings of the Authority shall not be invalidated by any vacancy among their number, or by any defect in the appointment or qualification of any member.

11. At the head of the executive staff of the Authority there shall be a chief railway commissioner, being a person with experience in Railway administration, who shall be appointed by the Governor-General, exercising his individual judgment, after consultation with the Authority.

12. The chief railway commissioner shall be assisted in the performance of his duties by a financial commissioner, who shall be appointed by the Governor-General, and by such additional commissioners, being persons with experience in railway administration, as the Authority on the recommendation of the chief railway commissioner may appoint.

13. The chief railway commissioner shall not be removed from office except by the Authority and with the approval of the Governor-General, exercising his individual judgment, and the financial commissioner shall not be removed from office except by the Governor-General, exercising his individual judgment.

14. The chief railway commissioner and the financial commissioner shall have the right to attend any meeting of the Authority, and the financial commissioner shall have the right to require any matter which relates to, or affects, finance to be referred to the Authority.

15. The Authority shall not be liable to pay Indian income tax or supertax on any of its income, profits or gains.

16. The Authority shall entrust all their money which is not immediately needed to the Reserve Bank of India and employ that bank as their agents for all transactions in India relating to remittances, exchange and banking, and the bank shall undertake the custody of such moneys and such agency transactions on the same terms and conditions as those upon which they undertake the custody of moneys belonging to, or agency transactions for, the Federal Government.

Section 317

NINTH SCHEDULE

Provisions of Government of India Act continued in force with Amendments until the Establishment of the Federation

The Governor-General's Executive Council

Members of Council

36.—(1) The members of the Governor-General's Executive Council shall be appointed by His Majesty by warrant under the Royal Sign Manual.

(2) The number of the members of the Council shall be such as His Majesty thinks fit to appoint.

(3) Three at least of them must be persons who have been for at least ten years in the service of the Crown in India, and one must be a barrister of England or Ireland, or a member of the Faculty of Advocates of Scotland, or a pleader of a high court, of not less than ten years' standing.

(4) If any member of the Council (other than the Commander-in-Chief for the time being of His Majesty's forces in India) is at the time of his appointment in the military service of the Crown, he shall not, during his continuance in office as such member, hold any military command or be employed in actual military duties.

(5) Provision may be made by rules under this Act as to the qualifications to be required in respect of the members of the Governor-General's Executive Council, in any case where such provision is not made by the foregoing provisions of this section.

Rank and precedence of Commander-in Chief

37. If the Commander-in-Chief for the time being of His Majesty's forces in India is a member of the Governor-General's Executive Council, he shall, subject to the provisions of this Act, have rank and precedence in the Council next after the Governor-General.

Vice-President of Council

38. The Governor-General shall appoint a member of his Executive Council to be vice-president thereof.

Meetings

39.—(1) The Governor-General's Executive Council shall assemble at such places in India as the Governor-General in Council appoints.

(2) At any meeting of the Council the Governor-General or other person presiding and one member of the Council (other than the Commander-in-Chief) may exercise all the functions of the Governor-General in Council.

Business of Governor-General in Council

40.—(1) All orders and other proceedings of the Governor-General in Council shall be expressed to be made by the Governor-General in Council, and shall be signed by a secretary to the Government of India, or otherwise as the Governor-General in Council may direct, and, when so signed, shall not be called into

question in any legal proceeding on the ground that they were not duly made by the Governor-General in Council.

(2) The Governor-General may make rules and orders for the more convenient transaction of business in his Executive Council, and every order made or act done, in accordance with such rules and orders, shall be treated as being the order or the act of the Governor-General in Council.

41.—(1) If any difference of opinion arises on any question brought before a meeting of the Governor-General's Executive Council, the Governor-General in Council shall be bound by the opinion and decision of the majority of those present, and, if they are equally divided, the Governor-General or other person presiding shall have a second or casting vote. Procedure in case of difference of opinion

(2) Provided that, whenever any measure is proposed before the Governor-General in Council whereby the safety, tranquillity or interests of British India, or of any part thereof, are or may be, in the judgment of the Governor-General, essentially affected, and he is of opinion either that the measure proposed ought to be adopted and carried into execution, or that it ought to be suspended or rejected, and the majority present at a meeting of the Council dissent from that opinion, the Governor-General may, on his own authority and responsibility, adopt, suspend or reject the measure, in whole or in part.

(3) In every such case any two members of the dissentient majority may require that the adoption, suspension or rejection of the measure, and the fact of their dissent, be reported to the Secretary of State, and the report shall be accompanied by copies of any minutes which the members of the Council have recorded on the subject.

(4) Nothing in this section shall empower the Governor-General to do anything which he could not lawfully have done with the concurrence of his Council.

42. If the Governor-General is obliged to absent himself from any meeting of the Council, by indisposition or any other cause, the vice-president, or, if he is absent, the senior member (other than the Commander-in-Chief) present at the meeting, shall preside thereat, with the like powers as the Governor-General would have had if present: Provisions for absence of Governor-General from meetings of Council

Provided that, if the Governor-General is at the time resident at the place where the meeting is assembled, and is not prevented by indisposition from signing any act of Council made at the meeting, the act shall require his signature; but, if he declines or refuses to sign it, the like provisions shall have effect as in cases where the Governor-General, when present, dissents from the majority at a meeting of the Council.

43.—(1) Whenever the Governor-General in Council declares that it is expedient that the Governor-General should visit any part of India unaccompanied by his Executive Council, the Governor-General in Council may, by order, authorize the Governor-General alone to exercise, in his discretion, all or any of the powers which Powers of Governor-General in absence from Council

might be exercised by the Governor-General in Council at meetings of the Council.

The Indian Legislature

Indian legislature

63. Subject to the provisions of this Act, the Indian legislature shall consist of the Governor-General and two chambers, namely, the Council of State and the Legislative Assembly.

Except as otherwise provided by or under this Act, a Bill shall not be deemed to have been passed by the Indian legislature unless it has been agreed to by both chambers, either without amendment or with such amendments only as may be agreed to by both chambers.

Council of State

63A.—(1) The Council of State shall consist of not more than sixty members nominated or elected in accordance with rules made under this Act, of whom not more than twenty shall be official members.

(2) The Governor-General shall have power to appoint, from among the members of the Council of State, a president and other persons to preside in such circumstances as he may direct.

(3) The Governor-General shall have the right of addressing the Council of State, and may for that purpose require the attendance of its members.

Legislative Assembly

63B.—(1) The Legislative Assembly shall consist of members nominated or elected in accordance with rules made under this Act.

(2) The total number of members of the Legislative Assembly shall be one hundred and forty. The number of non-elected members shall be forty, of whom twenty-six shall be official members. The number of elected members shall be one hundred:

Provided that rules made under this Act may provide for increasing the number of members of the Legislative Assembly as fixed by this section, and may vary the proportion which the classes of members bear one to another, so, however, that at least five-sevenths of the members of the Legislative Assembly shall be elected members, and at least one-third of the other members shall be non-official members.

(3) The Governor-General shall have the right of addressing the Legislative Assembly, and may for that purpose require the attendance of its members.

President of Legislative Assembly

63C.—(1) There shall be a president of the Legislative Assembly, who shall be a member of the Assembly elected by the Assembly and approved by the Governor-General.

(2) There shall be a deputy president of the Legislative Assembly, who shall preside at meetings of the Assembly in the absence of the president, and who shall be a member of the Assembly elected by the Assembly and approved by the Governor-General.

(3) A president and a deputy president shall cease to hold office if they cease to be members of the Assembly. They may

resign office by writing under their hands addressed to the Governor-General, and may be removed from office by a vote of the Assembly with the concurrence of the Governor-General.

(4) A president and deputy-president shall receive such salaries as may be determined by Act of the Indian Legislature.

Duration and sessions of Legislative Assembly and Council of State

63D.—(1) Every Council of State shall continue for five years, and every Legislative Assembly for three years, from its first meeting:

Provided that—

(a) either chamber of the legislature may be sooner dissolved by the Governor-General; and

(b) any such period may be extended by the Governor-General if in special circumstances he so thinks fit; and

(c) after the dissolution of either chamber the Governor-General shall appoint a date not more than six months, or, with the sanction of the Secretary of State, not more than nine months, after the date of dissolution for the next session of that chamber.

(2) The Governor-General may appoint such times and places for holding the sessions of either chamber of the Indian legislature as he thinks fit, and may also from time to time, by notification or otherwise, prorogue such sessions.

(3) Any meeting of either chamber of the Indian legislature may be adjourned by the person presiding.

(4) All questions in either chamber shall be determined by a majority of votes of members present other than the presiding member, who shall, however, have and exercise a casting vote in the case of an equality of votes.

(5) The powers of either chamber of the Indian legislature may be exercised notwithstanding any vacancy in the chamber.

Membership of both chambers

63E.—(1) An official shall not be qualified for election as a member of either chamber of the Indian legislature, and, if any non-official member of either chamber accepts office in the service of the Crown in India, his seat in that chamber shall become vacant.

(2) If an elected member of either chamber of the Indian legislature becomes a member of the other chamber, his seat in such first-mentioned chamber shall thereupon become vacant.

(3) If any person is elected a member of both chambers of the Indian legislature, he shall, before he takes his seat in either chamber, signify in writing the chamber of which he desires to be a member, and thereupon his seat in the other chamber shall become vacant.

(4) Every member of the Governor-General's Executive Council shall be nominated as a member of one chamber of the Indian legislature, and shall have the right of attending in and addressing the other chamber, but shall not be a member of both chambers.

Supplementary provisions as to composition of Legislative Assembly and Council of State

64.—(1) Subject to the provisions of this Act, provision may be made by rules under this Act as to—

(a) the term of office of nominated members of the Council of State and the Legislative Assembly, and the manner of filling casual vacancies occurring by reason of absence of members from India, inability to attend to duty, death, acceptance of office, or resignation duly accepted, or otherwise; and

(b) the conditions under which and the manner in which persons may be nominated as members of the Council of State or the Legislative Assembly; and

(c) the qualification of electors, the constitution of constituencies, and the method of election for the Council of State and the Legislative Assembly (including the number of members to be elected by communal and other electorates) and any matter incidental or ancillary thereto; and

(d) the qualifications for being or for being nominated or elected as members of the Council of State or the Legislative Assembly; and

(e) the final decision of doubts or disputes as to the validity of an election; and

(f) the manner in which the rules are to be carried into effect.

(2) Subject to any such rules, any person who is a ruler or subject of any state in India may be nominated as a member of the Council of State or the Legislative Assembly.

Business and proceedings in Indian legislature

67.—(1) Provision may be made by rules under this Act for regulating the course of business and the preservation of order in the chambers of the Indian legislature, and as to the persons to preside at the meetings of the Legislative Assembly in the absence of the president and the deputy president; and the rules may provide for the number of members required to constitute a quorum, and for prohibiting or regulating the asking of questions on, and the discussion of, any subject specified in the rules.

(2A) Where in either chamber of the Indian legislature any Bill has been introduced, or is proposed to be introduced, or any amendment to a Bill is moved, or proposed to be moved, the Governor-General may certify that the Bill, or any clause of it, or the amendment, affects the safety or tranquillity of British India or any part thereof, and may direct that no proceedings, or that no further proceedings, shall be taken by the chamber in relation to the Bill, clause, or amendment, and effect shall be given to such direction.

(3) If any Bill which has been passed by one chamber is not, within six months after the passage of the Bill by that chamber, passed by the other chamber either without amendments or with such amendments as may be agreed to by the two chambers, the Governor-General may in his discretion refer the matter for decision

to a joint sitting of both chambers : Provided that standing orders made under this section may provide for meetings of members of both chambers appointed for the purpose, in order to discuss any difference of opinion which has arisen between the two chambers.

(4) Without prejudice to the powers of the Governor-General under section sixty-eight of this Act, the Governor-General may, where a Bill has been passed by both chambers of the Indian legislature, return the Bill for reconsideration by either chamber.

(5) Rules made for the purpose of this section may contain such general and supplemental provisions as appear necessary for the purpose of giving full effect to this section.

(6) Standing orders may be made providing for the conduct of business and the procedure to be followed in either chamber of the Indian legislature in so far as these matters are not provided for by rules made under this Act. The first standing orders shall be made by the Governor-General in Council, but may, with the consent of the Governor-General, be altered by the chamber to which they relate.

Any standing order made as aforesaid which is repugnant to the provisions of any rules made under this Act shall, to the extent of that repugnancy but not otherwise, be void.

(7) Subject to the rules and standing orders affecting the chamber, there shall be freedom of speech in both chambers of the Indian legislature. No person shall be liable to any proceedings in any court by reason of his speech or vote in either chamber, or by reason of anything contained in any official report of the proceedings of either chamber.

67A.—(1) The estimated annual expenditure and revenue of the Governor-General in Council shall be laid in the form of a statement before both Chambers of the Indian legislature in each year. Indian Budget

(2) No proposal for the appropriation of any revenue or moneys for any purpose shall be made except on the recommendation of the Governor-General.

(3) The proposals of the Governor-General in Council for the appropriation of revenue or moneys relating to the following heads of expenditure shall not be submitted to the vote of the Legislative Assembly,[1] nor shall they be open to discussion by either chamber at the time when the annual statement is under consideration unless the Governor-General otherwise directs :—

(i) interest and sinking fund charges on loans ; and

(ii) expenditure of which the amount is prescribed by or under any law ; and

(iii) salaries (including in the case of the Governor-General sums payable on his account in respect of his office) and pensions payable to or to the dependants of—

(*a*) persons appointed by or with the approval of His Majesty ;

[1] See s. 34 (*1*).

(b) Chief Commissioners and Judicial Commissioners ; and

(iv) any grants for purposes connected with the administration of any areas in a Province which are for the time being Excluded Areas; and

(v) the sums payable to His Majesty under the Government of India Act, 1935, in respect of the expenses of His Majesty incurred in discharging the functions of the Crown in relation to Indian States ; and

(vi) expenditure classified by the order of the Governor-General in Council as—

(a) ecclesiastical ;
(b) external affairs ;
(c) defence ; or
(d) relating to tribal areas.

(vii) Expenditure of the Governor-General in discharging his functions as respects matters with respect to which he is required by the provisions of the Government of India Act, 1935, for the time being in force to act in his discretion ;

(viii) any other expenditure declared by the provisions of the Government of India Act, 1935, for the time being in force to be charged on the revenues of the Federation.

(4) If any question arises as to whether any proposed appropriation of revenue or moneys does or does not relate to the above heads, the decision of the Governor-General on the question shall be final.

(5) The proposals of the Governor-General in Council for the appropriation of revenue or moneys relating to heads of expenditure not specified in the above heads shall be submitted to the vote of the Legislative Assembly in the form of demands for grants.

(6) The Legislative Assembly may assent or refuse its assent to any demand or may reduce the amount referred to in any demand by a reduction of the whole grant.

(7) The demands as voted by the Legislative Assembly shall be submitted to the Governor-General in council, who shall, if he declares that he is satisfied that any demand which has been refused by the Legislative Assembly is essential to the discharge of his responsibilities, act as if it had been assented to, notwithstanding the withholding of such assent, or the reduction of the amount therein referred to, by the Legislative Assembly.

(8) Notwithstanding anything in this section, the Governor-General shall have power, in cases of emergency, to authorise such expenditure as may, in his opinion, be necessary for the safety or tranquillity of British India or any part thereof.

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67B.—(1) Where either chamber of the Indian legislature refuses leave to introduce, or fails to pass in a form recommended by the Governor-General, any Bill, the Governor-General may certify that the passage of the Bill is essential for the safety, tran-

quillity or interests of British India or any part thereof, and thereupon—

(a) if the Bill has already been passed by the other chamber, the Bill shall, on signature by the Governor-General, notwithstanding that it has not been consented to by both chambers, forthwith become an Act of the Indian legislature in the form of the Bill as originally introduced or proposed to be introduced in the Indian legislature, or (as the case may be) in the form recommended by the Governor-General; and

(b) if the Bill has not already been so passed, the Bill shall be laid before the other chamber, and, if consented to by that chamber in the form recommended by the Governor-General, shall become an Act as aforesaid on the signification of the Governor-General's assent, or, if not so consented to, shall, on signature by the Governor-General, become an Act as aforesaid.

(2) Every such Act shall be expressed to be made by the Governor-General, and shall, as soon as practicable after being made, be laid before both Houses of Parliament, and shall not have effect until it has received His Majesty's assent, and shall not be presented for His Majesty's assent until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat; and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor-General, the Act shall have the same force and effect as an Act passed by the Indian legislature and duly assented to:

Provided that, where in the opinion of the Governor-General a state of emergency exists which justifies such action, the Governor-General may direct that any such Act shall come into operation forthwith, and thereupon the Act shall have such force and effect as aforesaid, subject, however, to disallowance by His Majesty in Council.

Assent of Governor-General to Bills

68.—(1) When a Bill has been passed by both chambers of the Indian legislature, the Governor-General may declare that he assents to the Bill, or that he withholds assent from the Bill, or that he reserves the Bill for the signification of His Majesty's pleasure thereon.

(2) A Bill passed by both chambers of the Indian legislature shall not become an Act until the Governor-General has declared his assent thereto, or, in the case of a Bill reserved for the signification of His Majesty's pleasure, until His Majesty in Council has signified his assent and that assent has been notified by the Governor-General.

Power of Crown to disallow Acts

69.—(1) When an Act of the Indian legislature has been assented to by the Governor-General, he shall send to the Secretary of State an authentic copy thereof, and it shall be lawful for His Majesty in Council to signify his disallowance of any such Act.

(2) Where the disallowance of any such Act has been so signified, the Governor-General shall forthwith notify the disallowance, and thereupon the Act, as from the date of the notification, shall become void accordingly.

Power to make ordinances in cases of emergency

72. The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian legislature; but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature, and may be controlled or superseded by any such Act.

Salaries, leave of absence, vacation of office, etc.

Salaries and allowances of Governor-General and certain other officials in India

85.—(1) There shall be paid to the Governor-General of India, to the Commander-in-Chief of His Majesty's Forces in India and to the members of the Governor-General's Executive Council (other than the Commander-in-Chief), out of the revenues of the Governor-General in Council, such salaries and such allowances (if any) for equipment and voyage as the Secretary of State may by order fix in that behalf and subject to or in default of any such order as are payable at the commencement of Part III of the Government of India Act, 1935; but the salary of the Governor-General shall not exceed two hundred and fifty-six thousand rupees annually, the salary of the Commander-in-Chief shall not exceed one hundred thousand rupees annually and the salary of members of the Governor-General's Executive Council (other than the Commander-in-Chief) shall not exceed eighty thousand rupees annually.

(2) Provided as follows :—

(*a*) the Secretary of State shall not make any Order affecting salaries of members of the Governor-General's Executive Council except after consulting his advisers and with the concurrence of at least one-half of them;

(*b*) if any person to whom this section applies holds or enjoys any pension or salary or any office of profit under the Crown or under any public office, his salary under this section shall be reduced by the amount of the pension, salary or profits of office so held or enjoyed by him;

(*c*) nothing in the provisions of this section with respect to allowances shall authorize the imposition of any additional charge on the revenues of the Governor-General in Council.

(3) The remuneration payable to a person under this section shall commence on his taking upon himself the execution of his office and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein :

Provided that nothing in this section shall apply to the allowances or other forms of profit and advantage which may have been sanctioned for such persons before the commencement of Part III of the Government of India Act, 1935, by the Secretary of State in Council or may thereafter be sanctioned by the Secretary of State.

86.—(1) The Secretary of State may grant to the Governor-General and, on the recommendation of the Governor-General in Council, to the Commander-in-Chief, leave of absence for urgent reasons of public interest, or of health or of private affairs. Power to grant leave of absence to Governor-General, etc.

(2) The Governor-General in Council may grant to any member of his Executive Council (other than the Commander-in-Chief) leave of absence for urgent reasons of health or of private affairs.

(3) Leave of absence shall not be granted to any person in pursuance of this section for any period exceeding four months nor more than once during his tenure of office :

Provided that the Secretary of State may, if he thinks fit, extend any period of leave so granted, but in any such case the reasons for the extension shall be set forth in a minute signed by the Secretary of State and laid before both Houses of Parliament.

(4) Where leave of absence is granted to any person in pursuance of this section, he shall retain his office during the period of leave as originally granted, or, if that period is extended by the Secretary of State during the period as so extended, but, if his absence exceeds that period, his office shall be deemed to have become vacant in the case of a person granted leave for urgent reasons of public interest as from the termination of that period and in any other case as from the commencement of his absence.

(5) Where a person obtains leave of absence in pursuance of this section, he shall be entitled to receive during his absence such leave-allowances as may be prescribed by rules made by the Secretary of State, but, if he does not resume his duties upon the termination of the period of the leave, he shall, unless the Secretary of State otherwise directs, repay, in such manner as may be so prescribed as aforesaid, any leave-allowances received under this subsection.

(6) If the Governor-General or the Commander-in-Chief is granted leave for urgent reasons of public interest, the Secretary of State may, in addition to the leave-allowances to which he is entitled under this section, grant to him such further allowances in respect of travelling expenses as the Secretary of State may think fit.

(7) Rules made under this section shall be laid before both Houses of Parliament as soon as may be after they are made.

87.—(1) Where leave is granted in pursuance of the foregoing section to the Governor-General or to the Commander-in-Chief, a person shall be appointed to act in his place during his absence, and the appointment shall be made by His Majesty by warrant under the Royal Sign Manual. The person so appointed during the absence of the Commander-in-Chief may, if the Commander-in-Chief was a member of the Executive Council of the Governor-General, be also Acting appointments, during the absence of the Governor-General, etc. on leave

appointed by the Governor-General in Council to be a temporary member of that Council.

(2) The person so appointed shall, until the return to duty of the permanent holder of the office, or, if he does not return, until a successor arrives, hold and execute the office to which he has been appointed and shall have and may exercise all the rights and powers thereof and shall be entitled to receive the emoluments and advantages appertaining to the office, foregoing the emoluments and advantages (if any) to which he was entitled at the time of his being appointed to that office.

Power for Governor-General to exercise powers before taking seat

89.—(1) If any person appointed to the office of Governor-General is in India on or after the event on which he is to succeed, and thinks it necessary to exercise the powers of Governor-General before he takes his seat in Council, he may make known by notification his appointment and his intention to assume the office of Governor-General.

(2) After the notification, and thenceforth until he repairs to the place where the Council may assemble, he may exercise alone all or any of the powers which might be exercised by the Governor-General in Council.

(3) All acts done in the Council after the date of the notification, but before the communication thereof to the Council, shall be valid, subject, nevertheless, to revocation or alteration by the person who has so assumed the office of Governor-General.

(4) When the office of Governor-General is assumed under the foregoing provision, the vice-president, or, if he is absent, the senior member of the council (other than the Commander-in-Chief) then present, shall preside therein, with the same powers as the Governor-General would have had if present.

Temporary vacancy in office of Governor-General

90.—(1) If a vacancy occurs in the office of Governor-General when there is no successor in India to supply the vacancy, that one of the following governors, that is to say, the Governor of Madras, the Governor of Bombay, and the Governor of Bengal, who was first appointed to the office of governor by His Majesty shall hold and execute the office of Governor-General until a successor arrives or until some person in India is duly appointed thereto.

(2) Every such acting Governor-General, while acting as such, shall have and may exercise all the rights and powers of the office of Governor-General, and shall be entitled to receive the emoluments and advantages appertaining to the office, forgoing the salary and allowances appertaining to his office of Governor, and shall not act in his office of Governor.

(3) If, on the vacancy occurring, it appears to the governor, who by virtue of this section holds and executes the office of Governor-General, necessary to exercise the powers thereof before he takes his seat in Council, he may make known by notification his appointment, and his intention to assume the office of Governor-General, and thereupon the provisions of section eighty-nine of this Act shall apply.

(4) Until such a governor has assumed the office of Governor-General, if no successor is on the spot to supply such vacancy, the vice-president, or, if he is absent, the senior member of the Executive Council (other than the Commander-in-Chief) shall hold and execute the office of Governor-General until the vacancy is filled in accordance with the provisions of this Act.

(5) Every vice-president or other member of Council so acting as Governor-General, while so acting, shall have and may exercise all the rights and powers of the office of Governor-General, and shall be entitled to receive the emoluments and advantages appertaining to the office, forgoing his salary and allowances as member of Council for that period.

Temporary vacancy in office of member of the Executive Council

92.—(1) If a vacancy occurs in the office of a member of the Executive Council of the Governor-General (other than the Commander-in-Chief), and there is no successor present on the spot, the Governor-General in Council shall supply the vacancy by appointing a temporary member of council.

(2) Until a successor arrives, the person so appointed shall hold and execute the office to which he has been appointed, and shall have and may exercise all the rights and powers thereof, and shall be entitled to receive the emoluments and advantages appertaining to the office, forgoing all emoluments and advantages to which he was entitled at the time of his being appointed to that office.

(3) If a member of the Executive Council of the Governor-General (other than the Commander-in-Chief) is, by infirmity or otherwise, rendered incapable of acting or of attending to act as such, or is absent on leave or special duty, the Governor-General in Council shall appoint some person to be a temporary member of council.

(4) Until the return to duty of the member so incapable or absent, the person temporarily appointed shall hold and execute the office to which he has been appointed, and shall have and may exercise all the rights and powers thereof, and shall be entitled to receive the emoluments and advantages appertaining to the office, forgoing the emoluments and advantages (if any) to which he was entitled at the time of his being appointed to that office.

(4A) When a member of the Executive Council is by infirmity or otherwise rendered incapable of acting or attending to act as such and a temporary member of council is appointed in his place, the absent member shall be entitled to receive half his salary for the period of his absence.

(5) Provided as follows :—

(*a*) no person may be appointed a temporary member of council who might not have been appointed to fill the vacancy supplied by the temporary appointment ; and

(*b*) if the Secretary of State informs the Governor-General that it is not the intention of His Majesty to fill a vacancy in the Governor-General's Executive Council,

no temporary appointment may be made under this section to fill the vacancy, and, if any such temporary appointment has been made before the date of the receipt of the information by the Governor-General, the tenure of the person temporarily appointed shall cease from that date.

Vacancies in legislative councils

93.—(1) A nominated or elected member of either chamber of the Indian legislature may resign his office to the Governor-General, and on the acceptance of the resignation the office shall become vacant.

(2) If for a period of two consecutive months any such member is absent from India or unable to attend to the duties of his office the Governor-General may, by notification published in the government gazette, declare that the seat in council of that member has become vacant.

Supplemental

Provisions as to rules

129A.—(1) Where any matter is required to be prescribed or regulated by rules under this Act, and no special provision is made as to the authority by whom the rules are to be made, the rules shall be made by the Governor-General in Council, with the sanction of the Secretary of State, and shall not be subject to repeal or alteration by any legislature in India.

(2) Any rules made under this Act may be so framed as to make different provision for different provinces.

(3) Any rules to which subsection (1) of this section applies shall be laid before both Houses of Parliament as soon as may be after they are made, and, if an address is presented to His Majesty by either House of Parliament within the next thirty days on which that House has sat after the rules are laid before it praying that the rules or any of them may be annulled, His Majesty in Council may annul the rules or any of them, and those rules shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder :

Provided that the Secretary of State may direct that any rules to which this section applies shall be laid in draft before both Houses of Parliament, and in such case the rules shall not be made unless both Houses by resolution approve the draft either without modification or addition, or with modifications and additions to which both Houses agree, but, upon such approval being given, the rules may be made in the form in which they have been approved, and such rules on being so made shall be of full force and effect, and shall not require to be further laid before Parliament.

TENTH SCHEDULE

Section 478

Enactments Repealed

Session and Chapter of Act	Title	Extent of Repeal
21 Geo. 3. c. 70.	The East India Company Act, 1780.	Section eighteen.
37 Geo. 3. c. 142.	The East India Act, 1797.	Section twelve.
16 & 17 Vict. c. 107.	The Customs Consolidation Act, 1853.	Section three hundred and twenty-nine.
23 & 24 Vict. c. 89.	An Act to extend in certain cases the provisions of the Superannuation Act, 1859.	The whole Act.
47 & 48 Vict. c. 38.	The Indian Marine Service Act, 1884.	The whole Act.
56 & 57 Vict. c. 62.	The Madras and Bombay Armies Act, 1893.	The whole Act.
5 & 6 Geo. 5. c. 61.	The Government of India Act, 1915.	The whole Act.
6 & 7 Geo. 5. c. 37.	The Government of India (Amendment) Act, 1916.	The whole Act, except sections six and eight.
9 & 10 Geo. 5. c. 101.	The Government of India Act, 1919.	The whole Act, except the Preamble and sub-section (1) of section forty-seven.
12 & 13 Geo. 5. c. 20.	The Indian High Courts Act, 1922.	The whole Act.
14 & 15 Geo. 5. c. 28.	The Government of India (Leave of Absence) Act, 1924.	The whole Act.
15 & 16 Geo. 5. c. 83.	The Government of India (Civil Services) Act, 1925.	The whole Act.
17 & 18 Geo. 5. c. 8.	The Government of India (Indian Navy) Act, 1927.	The whole Act, except section two and sub-section (1) of section four.
17 & 18 Geo. 5. c. 24.	The Government of India (Statutory Commission) Act, 1927.	The whole Act.
20 & 21 Geo. 5. c. 2.	The Government of India (Aden) Act, 1929.	The whole Act.
23 & 24 Geo. 5. c. 23.	The Government of India (Amendment) Act, 1933.	The whole Act.
23 & 24 Geo. 5. c. 36.	The Administration of Justice (Miscellaneous Provisions) Act, 1933.	In the First Schedule the words '5 & 6 'Geo. 5. c. 61; The 'Government of 'India Act; section 'one hundred and 'twenty-seven'.

APPENDIX I

DOMINIONS, INDIA, AND THE LEAGUE OF NATIONS

(*See Section* 11)

Dominions; Position of colonies prior to Statute of Westminster; and after; Reservations and disallowances; Colonial Laws Validity Act; Extra-territorial jurisdiction; Governor-General; Position of Dominions after Statute of Westminster; Foreign affairs; the Dominions and the League of Nations; Position of India in international law and the League of Nations.

Dominions

At the Colonial Conference of 1907, the style Dominion was formally adopted to denote those parts of royal possessions, other than the United Kingdom, which had attained the full measure of responsible government and had ceased to be dependencies. The word 'Dominion' covers the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, Newfoundland, and now the Irish Free State. A very brief summary of the main steps by which the important colonies attained the status of a Dominion is given below:

I. Prior to the Statute of Westminster.
II. After the Statute of Westminster.

Prior to the Statute of Westminster

Originally the colonies were dependencies but gradually they obtained responsible government. The movement in Canada is typical of the important factors which characterized and determined future development in the constitutional relations between Great Britain and those of her colonies which ultimately enjoyed a system of responsible government. There were the following features: (1) the claim by Imperial Parliament to unlimited sovereignty; (2) the claim by the colonies to autonomy, that in matters which affected them, the colonies should manage their own affairs; there was thus (3) a contradiction between the two, when each was pressed to its logical conclusion. As Cornewall Lewis said 'A self-governing dependency (supposing the dependency is not virtually independent) is a contradiction in terms'. (4) It is in the method by which this contradiction was solved that the Canadian conflict supplies the fourth element of permanent significance. The method of demarcation adopted between the powers and scope of the Imperial Government and those of the Colonial Government, was not along the lines of imperial and colonial legislative competence. All legislation was to be within colonial competence, but some of it would be liable to veto by the imperial authority, not on the ground that it was beyond the competence of the colonial legislature, but because it affected some specified imperial interest. The problem was to adjust and co-ordinate the activities of the colonial and of the imperial authorities, so that confusion and conflict might be avoided. The solution was found in the power of reservation of Bills and the power of disallowance of Acts passed by Colonial Legislatures and in the Colonial Laws Validity Act, 1865 (which even now regulates the exercise of legislative powers in the British Colonies, the Australian Commonwealth and those Dominions which have not adopted the Statute of Westminster).

Reservation and disallowance

In the various Dominion Acts, it is provided that no Bill can become law without the *assent* of the Governor-General. Assent may be withheld on instruction from the Crown. But this refusal of assent is now obsolete.

The Governor-General has the *power of reservation* of a Bill for the significance of His Majesty's pleasure; and in certain cases, it is provided in the constitution that certain classes of Bill shall be so reserved; for example in Australia, a Bill to limit appeals to the Privy Council, is to be so reserved. It may be provided in such cases that such a Bill is to drop unless assent is given by Order in Council within a certain period (one or two years), or alternatively, there may be a clause in the Bill suspending its operation until assent of the Crown is obtained. In the Africa Act there is a provision, similar to that in the Australia Act, to reserve a Bill repealing or amending the provision in the Act regarding the House of Assembly.[1]

Even after assent to any Bill by the Governor-General, the Crown has the *power of disallowance* of any Act within a specified period after such assent—one year in the case of Australia and Africa, and two years in the case of Canada.[2]

The Colonial Laws Validity Act, 1865, laid down the criterion of repugnancy. By s. 3, any Act of a Colonial Legislature repugnant to the provisions of an Act of Parliament extending to the colony or repugnant to any order or regulation made under the authority of such an Act (unless such Act is authorized by some Imperial Act) is to be void to the extent of such repugnancy.[3] S. 5 of the Act provides that every representative legislature shall have full power to make laws respecting the constitution, power, and procedure of such legislature; provided that such laws shall have been passed in such form and manner as may be required by an Act of Parliament or colonial law in force for the time being in that colony.

By this section, wide powers of constitutional amendment were conferred on the colonies, and the colonial legislature may bind its successors by some specified procedure.[4] There was another great issue affecting the extent of colonial authority. That was the limitation on the power of the Colonial Parliaments preventing them from passing any Act having *extra-territorial jurisdiction*; colonial legislative power applied only to the colonies and territorial waters.[5] But after the Statute of Westminster, the bar to the legislative powers of the Dominion legislatures has been removed, and they have extra-territorial jurisdiction.[6] But there exists a power in the Imperial Parliament denied to the Dominion Parliaments. The former can legislate for the whole of the Empire, and can regulate matters beyond the limits of British territory. Normally the Imperial Parliament limits its legislation to the acts, on foreign territory or on high seas, of British subjects, and to the regulation of British ships on the high seas, but this strict rule limiting the

[1] Cf. s. 58 Australia Act, s. 54 Canada Act, s. 64 Africa Act, and Article 41 Irish Free State Act.

[2] S. 59 Australia Act, s. 65 Africa Act, s. 56 Canada Act. Cf. ss. 32, 75 and 77, new Act.

[3] See per Lord Halsbury in *Riel* v. *The Queen*, [1885] A.C. 675 at p. 678.

[4] *Attorney-General, N.S.W.* v. *Trethowan*, [1932] A.C. 526.

[5] *Macleod* v. *Attorney-General, N.S.W.*, [1891] A.C. 455.

[6] See Part IX, Chapter I, Introduction under APPEAL TO THE KING IN COUNCIL FROM DOMINION COURTS: RECENT DECISIONS.

exercise of legislative power is not always adhered to. Thus, the *subjects* of Indian States are, on the ground that they are protected subjects, made amenable to the jurisdiction and legislation enacted under the Foreign Jurisdiction Act, 1890.

Some of the more important Imperial Acts in force in the British Empire (subject in some cases to Dominions' control) are:

(1) The Foreign Jurisdiction Act, 1890;
(2) The British Nationality and Status of Aliens Act, 1914;
(3) Merchant Shipping Acts;
(4) Imperial Copyright Act, 1911; and
(5) The Army Act (1881) and the Air Force (Constitution) Act (1917), now the Army and Air Force (Annual) Act; and the Naval Discipline Act, 1866 and 1884.

Governor-General

One element of imperial control over colonial administration lay originally in the power of the Governor-General (or Governor) appointed by the King, who was the intermediary between His Majesty's Government and the Colonial Government. But this control was soon relaxed and the constitutional practice arose that his powers were to be exercised only with the advice of his Dominion ministers. Though the appointment of the Governor-General was made by the King on the advice of the Imperial Government, yet care was taken in every case to ascertain that the nomination would be acceptable to the Government concerned. Since 1921, the nomination of the Governor-General has been largely dictated by the Dominion Governments. For change in the position of the Governor-General in the Dominions and comparison with the Governor-General in India, see Part II, Chapter II, Introduction under POSITION OF THE GOVERNOR-GENERAL IN INDIA AND IN THE DOMINIONS.

Another element of imperial control over colonial administration lay in the existence of the right to appeal from a decision of a Colonial Court to the Privy Council. This right of appeal has been seriously curtailed. See Part IX, Chapter I, Introduction under APPEAL TO THE KING IN COUNCIL FROM DOMINION COURTS.

The status and the powers of the more important colonies were greatly improved as a result of the Great War. The progress of the Dominions from the status of colonial dependency to the widest autonomy has been rapid and uninterrupted.

The growing demand for self-government and for freedom to manage their own matters without interference from the British Government gradually altered the spirit of the Dominion constitution. Interaction and co-operation of the law and the conventions of the constitution solved many of the difficult problems. In 1907, at the Colonial Conference, Dominion Status was recognized. The change in the position of the Dominions was formally recognized at the Imperial Conference, 1926, by the resolution that the United Kingdom and the Dominions are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect in their domestic or external affairs though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations. This Resolution might theoretically imply the existence of the *right of secession*. But, as Keith points out:[1] 'under the existing constitutional law of the Empire, no Dominion has the power to secede of its own volition;

[1] Sovereignty of the British Dominions, 1926, p. 186.

and no Dominion Act, even if assented to on behalf of the Crown, would have the slightest power to sever the British connexion.' He further points out that a Parliament created for a definite purpose cannot validly enact any laws beyond the scope of its powers. The Privy Council has for long taken a liberal view of the powers of legislation possessed by the Dominions. They are empowered to make laws for the peace, order and good government of their territories. These words have been held by the Privy Council to authorize the widest discretion of enactment.[1] It has always held that the Dominion Parliaments are not mere delegates of the Imperial Parliament restricted to a defined sphere and fettered in their operation, and that once given power over a subject, they are entitled to act as they think fit in the mode of carrying out the ends at which they aim. But that is very different from holding that they can alter the subjects or disregard the conditions on which they have been empowered to legislate by the Imperial Parliament. In so far as they purported so to act, the Privy Council has always held that such Acts are void and neither the Dominion Courts nor the Privy Council can give effect to them.[2]

An examination of the preamble to the Canada Act, the Africa Act and the Australia Act makes it perfectly clear that these constitutions contemplate the formation of a Union of States under the Crown of the United Kingdom of Great Britain. Under Article 1 of the Articles of Agreement for a Treaty between Great Britain and Ireland (which are annexed to the Irish Free State Act, 1922, and by s. 2 of that Act are given the force of law), it was declared that Ireland was to have the same constitutional status in the community of nations known as the British Empire as Canada, Australia, New Zealand and South Africa; and Article 2 laid down that 'subject to the provisions hereinafter set out, the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usages governing the relationship of the Crown or the Representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State'.

So it is quite evident that no Dominion can legislate, even with the Royal Assent, so as effectively to terminate the connexion of that Dominion with the British Empire. The Dominions are thus part of the British Empire and have no power to terminate their membership in the Empire without the legal intervention of the Imperial Government.[3]

The second limitation on the powers of the Dominion Parliaments lies in their inability to exercise the unfettered constituent power which belongs only to the Imperial Parliament. The Dominion Parliament is not a fully sovereign Parliament and there are limitations on its powers. It can under certain prescribed conditions (which must be strictly complied with on pain of nullity of its Act) alter the constitution of that Dominion. This rests on s. 5 of the Colonial Laws Validity Act, 1865, referred to already. This Act even after the Statute of Westminster, 1931, regulates the exercise of legislative powers in the British colonies, Australia and those Dominions which have not adopted the Statute of Westminster. This limitation on the power of the Dominion Parliaments

[1] See *Reil* v. *The Queen*, 10 App. Cas. 675, at 678; *A.-G. for Canada* v. *Cain*, [1906] A.C. 542; see per Viscount Sankey L.C. in *British Coal Corporation* v. *The King*, [1935] A.C. 500 at 518-19.

[2] Keith, *op. cit.*, p. 186.

[3] Keith, *op. cit.*, p. 196.

follows from the fact that there is federation in the Dominions, which is in the nature of a treaty between the various constituent states making up the federation, and so the constitution must necessarily be rigid and only alterable by extraordinary procedure.

Position of the Dominions after the Statute of Westminster

(a) It was enacted that the Colonial Laws Validity Act, 1865, should cease to apply to the Dominions or to the Provinces of Canada, that the Dominions and the Provinces of Canada should have the power to repeal or amend an Imperial Act in so far as it forms part of the law of that Dominion; and that no law of a Dominion or of any province in Canada should be void on the ground of repugnancy to an Imperial Act.

(b) The Dominion Parliaments were to have full power to make laws with extra-territorial operation. But such power is not given to the provinces of Canada or the states of Australia.

(c) No Imperial Act passed after the commencement of the Statute shall extend to a Dominion unless it is expressly declared that the Dominion has requested, and consented to, the enactment thereof. The power of the Imperial Parliament to legislate for the states of Australia is preserved. But in order to amend the Canadian constitution and ss. 1–8 of the Australia Act, Imperial legislation will be still necessary. See the recent decisions (June, 1935) of the Privy Council in *British Coal Corporation* v. *The King*, and *Moore and ors.* v. *A.-G. for the Irish Free State* referred to in Part IX, Chapter I, Introduction under APPEAL TO THE KING IN COUNCIL FROM DOMINION COURTS: *Canada*. Powers to Canada and Australia to amend their constitutions will be no doubt given if the provinces or states concur in requesting them. The substantive section of the Statute[1] dealing with merchant shipping and s. 6 dealing with Courts of Admiralty will not apply to Australia, New Zealand or Newfoundland unless adopted by the Parliaments of those Dominions.

Present position of the Dominions

The present legal status of the Dominions is without precedent and difficult to describe accurately. The legal supremacy of the Imperial Parliament in relation to the Dominions still remains, but remains to be exercised with their consent. The Crown remains as the one effective bond of the Empire. The position is one of difficulty and delicacy. But there are growing up conventions to modify the strict law and the interaction and co-operation of the law and the conventions of the constitution smooth over the anomalies.

Regarding Foreign Affairs, as was stated in the Imperial Conference of 1926, equality of *status* as laid down in the famous Resolution of Dominion Autonomy, does not mean equality of *stature*. Dominions have now no doubt the right to be separately represented abroad, for example, there is a Canadian minister at Washington but in the main the Dominions depend upon the United Kingdom for their foreign relations. The British position is that the relations of the part of the British Empire *inter se* are not regulated by the League of Nations Covenant or by international law. It is fully recognized that the United Kingdom must be primarily responsible for foreign policy, despite the duty of consultation with the Dominions.[2]

[1] Ss. 2–5.

[2] Keith, *op. cit.*, Preface IX, X

The Dominions and the League of Nations

In accordance with a Resolution of the Imperial Conference of 1926, it is recognized that it is the right of the government of each Dominion to advise the Crown in all matters relating to its own affairs, and so it would not be constitutional for the Government of the United Kingdom to advise the King upon any Dominion matter against the views of the Dominion Government. Dominion ministers may thus advise the King to exercise the prerogative power of making treaties, and it is possible for a Dominion to conclude a treaty without the consent of the British Government. Where a treaty is made by the Crown on behalf of the British Commonwealth of Nations, it is to be signed by a United Kingdom plenipotentiary on behalf of Great Britain and all parts of the Empire which are not separate members of the League of Nations and separate plenipotentiaries will sign for each Dominion (see the proceedings of the Imperial Conference, 1926 and 1930). At the Peace Conference in 1918, the Dominions insisted that their individuality must be recognized at the Conference and the British Government succeeded in securing the assent of the Allied Powers to this innovation. The British Empire was represented equally with the four great powers, the United States, France, Italy and Japan, by a delegate of five on which the Dominion representatives could sit and further four great Dominions were accorded representation, equal to that allowed to the minor Allied Powers. At the demand of the Dominions, the Peace Treaty was signed by the United Kingdom representative simply for the King without specification; and by the representatives of the Dominions and of India with specification showing for what part of the Empire each signed. Ratification of the Treaty was only made after the Dominion Parliaments had been accorded the power to discuss and approve the Treaty. The Dominions thus achieved an international status which was placed beyond doubt by their inclusion along with India as original members of the League of Nations.[1]

Inter-imperial declarations and resolutions of the Imperial Conference regarding changes in the position of the Dominions cannot affect international law. The Dominions (except Newfoundland) are separate members of the League of Nations and have given separate adherence to the Permanent Court of International Justice. The status gained by the Dominions in the Great War and the Peace Conference has been rendered permanent by their insistence on their inclusion as distinct members of the League of Nations. Besides the British Empire accorded membership of the League of Nations, there were placed Canada, Australia, South Africa and New Zealand, together with India in anticipation of its ultimate attainment of Dominion status.[2] The mode of grouping was intended to show that the Dominions, though distinct members of the League, were also parts of the Empire. The representatives of the Dominions attended the First Assembly of the League of Nations under the sole authority of their own governments, without any intervention by the Imperial Government or powers from the King in his imperial capacity; and they voiced opinions which they had not discussed with their colleagues representing the British Empire. In a proposal for enquiry by the League about the distribution of raw materials, the Dominions and India took a view contrary to that of the British member of the Council. Regarding the admission of certain States to the League,

[1] Keith, *Dominion Autonomy in Practice*, pp. 56-57.

[2] Keith, *Dominion Autonomy in Practice*, p. 57.

Canada and South Africa supported the proposal against the view of Great Britain. A proposal of Lord Robert Cecil for the addition of a new condition of admission of states to the League was opposed by Canada. The Dominions vote as they please. Thus the Dominions as members of the League of Nations are perfectly independent of the British representatives. The Dominion representative acts on the *authority* given by his government alone, not that by the King.

Position of India in international law and the League of Nations

Since the Great War, the position of India *vis-à-vis* the League of Nations and Foreign Powers has greatly altered. At the Peace Conference, the Powers with special interests, including the Dominions and India, attended the sessions at which questions concerning them were discussed. The Peace Treaty was signed by the United Kingdom representatives simply for the King without specification and by the representatives of the Dominions and of India with specification showing for which part of the Empire each signed. India was thus a signatory to the Peace Treaty and also an original member of the League of Nations in anticipation of its ultimate attainment of Dominion Status.[1] The Imperial Conferences of 1917 and 1918 recognized the right of India to regulate immigration at pleasure, subject to the principle that visits for pleasure, business (as opposed to labour) or education should be facilitated. In January 1927, an agreement between the Governments of the Union of South Africa and of India regarding the position of Indians in South Africa, was concluded. At the London Reparations Conference, 1924, representatives of the Dominions and of India were made members of the British Empire Delegation at the Conference on the panel system.

Under Part I of Article 1 of the Covenant of the League of Nations, it is provided that the original members of the League of Nations shall be first those of the signatories of the Peace Treaty named in the Annex to the Covenant and secondly such of those other States also named in the Annex as should accede without reservation to the Covenant. Under Part 2 of the same Article 1, it is provided that any fully self-governing state, Dominion or colony not named in the Annex might become a member of the League if its admission was agreed to by two-thirds of the Assembly of the League. India is not a self-governing state, Dominion or colony under Part 2. But she by virtue of the part she took in the Great War, was treated as one of the High Contracting Parties and as such, was one of the original members of the League. Once member of the League, India's status in it became one of absolute equality with the other state members. She has the same status as any other member *vis-à-vis* the Permanent Court of International Justice, the International Labour Office, the Assembly, the Council and the Secretariat of the League. For over a decade India has had a place in the Governing Body of the Labour Organization. In the Treaties and conventions formed under the auspices of the League, India, along with the Dominions, has been duly conceded the status of a state. In short, her status in the League is the same as that of Canada or Australia, a full member independent of Great Britain. There are numerous international agreements and conventions to which India is a party independently of Great Britain, and of which *a few examples are given below:*

(*a*) India is a signatory to the Convention regarding Permanent Court of International Justice and also the optional clause recognizing the

[1] Keith, *Dominion Autonomy in Practice* p. 57.

Court's jurisdiction as described in Article 36 of the Statute. India ratified the last convention with the following reservation: Reciprocity ten years and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after the ratification, other than (1) disputes regarding which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement; (2) disputes with the Government of any other members of the League which is a member of the British Commonweath of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; (3) disputes with regard to questions which by international law fall exclusively within the jurisdiction of India; and subject to condition regarding suspension of the proceedings.[1]

(*b*) India is a signatory to the International Convention for the suppression of the traffic in women and children, with the reservation of the right at its discretion to substitute the age of sixteen years or any greater age that may be decided upon, for the prescribed age-limits in the Convention.[2] As a result of the ratification, Act XX of 1923, India Penal Code (Amendment) Act was enacted to give effect to it.

(*c*) India is a party to certain amendments to the Covenants of the League.[3]

(*d*) India is a signatory in 1925 to the International Convention for the suppression of the circulation of, and traffic in, obscene publications. As a result of the ratification, Act VIII of 1925, Obscene Publications Act, was passed.

(*e*) India is a signatory to the Convention and statute on freedom of transit and on the régime of navigable waterways of international concern (in 1922) and also to the Convention on the international régime of railways and of maritime ports (in 1925). It may be noted that the ratification of the Convention of 1923 by the British Empire in 1924 was qualified by the statement that it was not to apply, *inter alia*, to India; subsequently India ratified it in 1925.

(*f*) India is a signatory to the Agreement at the Second Opium Conference of 1925 and of the International Opium Convention in February 1926. The ratification was followed by the enactment of the Dangerous Drugs Act, 1930.

(*g*) The Convention relating to the transmission in transit of electric power of 1923 was ratified by the British Empire in 1923 with reservation excluding India and the Dominions. India did not ratify the Convention (up to 1931).

(*h*) India is a signatory to the Slavery Convention of 1926. The representatives of the British Empire ratified this Convention, the ratification not to bind India or any British Dominion which is a separate member of the League and does not separately sign or accede to the Convention. India ratified the Convention with the reservation by its representative that his signature is not binding as regards the enforcement of certain Articles of that Convention upon certain territories in India, and with another reservation.

(*i*) India is a signatory to the Convention for limiting the manufacture and regulating the distribution of narcotic drugs in 1932 and the ratification was followed by the Dangerous Drugs (Amendment) Act, 1933.

[1] See League of Nations Publications: General 1931–6, p. 10.
[2] Ibid., p. 18.
[3] Ibid., pp. 20-21.

(*j*) India is a signatory to the General Act (Pacific Settlement of International Disputes) in 1931, subject to a number of conditions and reservations, one of them being that disputes between the Government of India and the Government of any other member of the League which is a member of the British Commonwealth of Nations, shall be settled in such a manner as the parties have agreed or shall agree.

(*k*) India has been a signatory to thirteen International Labour Conventions between 1921 and 1932. Ratification to the Conventions has been followed in most cases by legislation or executive orders to give effect thereto, e.g. Indian Factories (Amendment) Act, 1922, the Indian Mines Act, 1923, and the Indian Railways (Amendment) Act, 1930, to give effect to the Conventions limiting hours of work in industrial undertakings, concerning night work of young persons employed in industry, and concerning the application of weekly rest; the Indian Merchant Shipping (Amendment) Act, 1931, to give effect to the Conventions concerning the fixing of the minimum age for admission of young persons as trimmers or stokers, concerning the compulsory medical examination of young persons employed at sea and concerning seamen's agreements.

It may be noted that an Indian is appointed by His Majesty as his plenipotentiary to sign international Treaties, Conventions and Agreements for India.

From what has been stated above, it will appear that, though India has not yet attained the position of independence enjoyed by the Dominions prior to the Statute of Westminster, yet it is in a large measure independent legally of the United Kingdom in the sphere of international law and the League of Nations. It has a legal entity of its own.

As explained above, the position of the various members of the British Commonwealth of Nations is very anomalous, particularly as a result of the Statute of Westminster.

Recent events in Europe leading up to the Munich Agreement, have called prominent attention to the urgent necessity for the establishment of a federation of the British Commonwealth of Nations including India, to bind the various components together so as to form a homogeneous entity for the purposes of external defence, without sacrifice of independence.

APPENDIX II

COLLECTIVE RESPONSIBILITY AND PARTY SYSTEM IN INDIAN LEGISLATURES

Difficulties in the way of establishment of Cabinet responsibility and of Party system; A—due to Federal system itself (1) Rigid constitution preventing by convention; (2) Autonomous units with separate interests; B—Due to Federation system in India: (1) Communal representation; (2) State representatives; and (3) Dyarchy in the centre. Deadlock on vote of no confidence. Matter simpler in provincial legislature, and party system possible.

The Instrument of Instructions to the Governor-General (and the Governor) enjoins in him the duty of fostering a sense of joint responsibility among the ministers. He is to choose a chief minister and in consultation with him, appoint those as ministers (including if possible representatives of the Federal States and of important minority communities) who are most likely collectively to command the confidence of the legislature. Under the Act, the Governor-General (or the Governor) may if he likes preside at meetings of the council of ministers or abstain from attending these meetings.

In the Introduction to Part III, Chapter II, it has been pointed out that there are many indications in the Act and the Instrument of Instructions, that it is the intention of Parliament to help in the establishment of Cabinet responsibility in the Legislatures in India. The question as to how far under the Act one may expect such establishment is an interesting one.

Difficulties due to the Federal system

There seems to be certain inherent difficulties in the way of the establishment of the system of Cabinet (or collective) responsibility in the Federal system. First, the Cabinet system as in England depends almost wholly upon precedent, custom and convention, upon an unwritten constitution. The Federal system, on the other hand, implies a written, a rigid, constitution. It may be asked whether it is possible to continue a successful working of the Cabinet system with a Federal system, in which the growth of custom and conventions of the constitution may be retarded by a rigid constitution.

The Canadian constitution represents the earliest attempt to combine the principle of a Cabinet system with that of federalism. The Canadian Government was to consist of the King represented by the Governor-General, aided and advised by the Privy Council, the members of which will be chosen by him. This was intended to be the Cabinet and, following the English precedent, the Canada Act did not prescribe that the members of the Cabinet should be members of Legislature or that the Cabinet was to be a homogeneous body politically dependent upon a Parliamentary majority, and under the control of an acknowledged leader. But in the working of the Canadian constitution, English customs and conventions have been followed. As Marriott observes, the working of the Canadian Cabinet system has been very successful. The Australia Act of 1900 laid down that ministers should be members of the Legislature; this principle was for the first time in the British Empire made part of a written constitution, and South Africa in 1909 followed the example. In the Government of India Act, this has been followed. Federalism in the British Commonwealth of Nations is of comparatively recent origin and it is perhaps too early to say definitely whether a written constitution is really a bar to the establishment of the Cabinet system in a Federation. The success of the system in Canada may be due to the following causes: that the constitution regarding the Cabinet is unwritten, that English customs and conventions have been deliberately followed, and the strength of inherited English traditions, as Marriott remarks, may be a factor. But it may be remarked that if the constitution leaves untouched the possibility of growth of customs and conventions in this respect, the Federal Executive may be guided by the wisdom of an experienced statesman at the head who can greatly assist in the growth of customs and conventions which, outside the Act, will guide the relations of the members of the Cabinet with the Legislature. Provided the written constitution does not make rigid rules about the Executive (as has been done for instance in the Irish Free State Act), there seems no reason why the mere existence of a written constitution should be a bar to the growth of the system of collective responsibility of the Executive.

The next difficulty in the way of the growth of the Cabinet system in a Federal Government due to the inherent nature of Federalism, is that it is based on a union between various autonomous units, practically co-equal in power, each independent of the others, each with its own special interests different from the interests of the other units. The

representatives from each of the constituent units to the Federal Legislature will naturally think of the interests of his State; for example, there will be a struggle as between the Federation of India and the Units, and as between the Units themselves, over the proceeds of income-tax. Such divergence of interests is not conducive to the growth of a strong party system on which Cabinet responsibility must be based. It has been explained in the Introduction to Part III, Chapter II, under CABINET GOVERNMENT, that the Cabinet system means the collective responsibility of the members of the Cabinet, which implies the political homogeneity of the Executive and is dependent upon a Parliamentary majority. But in the Federal Legislature, there is likely to be an absence of any common link uniting the members into definite parties. So in a Federation, there is bound to be a very loose party system, the members forming groups as a particular question comes up for decision in the Legislature. These groups will vary in number and constitution as different matters come up for consideration.

In the Federal Legislature of India, the difficulty above noted is accentuated by two special factors, which tend to retard the formation of a homogeneous ministry or of definite parties. The legislature will be based on a system of communal representation and the Governor-General will be directed by the Instrument of Instructions to include in his ministry important minority communities. As the Joint Parliamentary Committee observed, such a ministry must tend to be the representative not, as in England, of a single majority party or even of a coalition of parties, but also of minorities as such. Further, the weapon of dissolution, so potent in the hands of the executive under ordinary parliamentary constitutions to put pressure on an obstructive legislature, will be practically ineffective, as owing to the system of communal representation, a general election following upon dissolution may well produce a legislature of the same complexion as its predecessor. It is unfortunately impossible to provide against these dangers by any paper enactment regulating the relations between the ministry and the legislature.

The representation of Federated States in the Federal Legislature will introduce another discordant factor. The State representatives will be the nominees of the State and will be in the legislature to look after the interests of the State. In matters affecting the interests of the States against British India, no doubt the State representatives are likely to unite, but this will only be a temporary union. Further, there will be two distinct types of members in the Federal Legislature, those from British India and those from Federated States. The former (who will be almost all elected) will have the normal latitude of personal opinion and discretion characteristic of the elected member of a popular assembly. But the latter will be the delegates from States with mandate to give expression to the State policy on any federal question that may arise. The observations of the Joint Parliamentary Committee on this point are very pertinent. They say in paragraph 192 of their Report:

> It may be thought that this proposal runs the risk of adding to the possible dangers of communal representation in the Ministry, to which we have referred in speaking of the Provinces, the further dangers of territorial representation. We can scarcely doubt that State representation will always be regarded by the States themselves as an essential element in every administration, and this fact may be thought likely to retard the growth of political parties in the true sense, even more at the Centre than in the Provinces;

for the Federal Legislature, though intended to be representative of India as a whole, will itself be largely based, in any case, on communal representation. In these circumstances, we do not overlook the possibility that, in place of an Executive which propounds, and a Legislature which deliberates upon, a national policy, there may be found two bodies each tending to become, in a classic phrase, 'a congress of ambassadors from different and hostile interests, which interests each must maintain as an advocate and agent against other agents and advocates'. This, however, is a common feature of all Federations. Few, if any, have in practice found it possible to constitute an Executive into which an element of territorial representation does not in some sense enter, and in the Swiss constitution the principle of such representation is explicitly laid down; so that to advance this as an argument against the White Paper proposals would be, in effect, to reject an All-India Federation even as an ultimate ideal. Moreover, the limitation of the functions of the Federal Executive, to matters of essentially All-India interests, is calculated to minimize the dangers of both communal and territorial representation. Tariffs and excise duties, currency and transport, are national, not communal questions; and it is not unreasonable to assume that any clash of interest with regard to them will tend in future to have an economic rather than a communal origin. There will, therefore, be centripetal as well as centrifugal forces; and it seems to us indeed conceivable that, until the advent of a new and hitherto unknown alignment of parties, a central Executive such as we have described may even come to function, as we believe that the Executive of the Swiss Confederation functions, as a kind of business committee of the Legislature.

It may be incidentally noted that the two Houses of the Federal Legislature in India possess (except as regards financial matters) nearly co-equal powers. A deadlock may be created by one House passing a vote of no confidence in the ministry and the other House rejecting such a motion. This deadlock may be solved by a joint session, as tentatively suggested by Sir Samuel Hoare in his evidence before the Joint Parliamentary Committee. This will depend upon other factors, one of them being whether the Government can carry on with the support of one House. It will be difficult to ensure the stability of the Cabinet and the establishment of Cabinet responsibility, unless, by convention, one of the two Houses (preferably the Upper) is deprived of the power of controlling the Cabinet. In most countries within the British Empire, by convention and usage, the will of the Lower House prevails. Referring to the Dominion practice, Prof. Keith observes: 'It is, of course, the Lower House that determines the fate of a ministry, and on whose favours a ministry depends for its creation. The reasons are in part historical, the practice being borrowed from the United Kingdom usage, in part inevitable. . . . The Upper Houses have no originating financial powers and that is enough to debar them from claiming powers over ministers.' See further, Introduction to Part II, Chapter II, under VOTE OF NO CONFIDENCE.

A third difficulty in the way of the formation of the party system and the system of Parliamentary Government in the Federal Legislature is due to the fact that there is dyarchy in the centre. The Joint Committee endorsed the opinion expressed by the Statutory Commission on the working of provincial dyarchy under the old Act, that the sense

of responsibility of men must be enormously weakened if the Government functions in water-tight compartments, partitioned off by the clauses of the constitution. The Legislature in a dyarchy tends to become irresponsible as it cannot control certain functions of government which are reserved.

So, apart from the difficulties inherent in the nature of federalism, there are three peculiar difficulties in India which lie in the way of the formation of the party system and of Cabinet responsibility in the Federal Legislature. These are due to (1) the system of communal representation; (2) the State representation in the Federal Legislature; and (3) the system of dyarchy in the centre. Having regard to these difficulties, it will be very hard for the Governor-General, in spite of his instructions, to foster a sense of collective responsibility among his ministers.

But in the Province, the matter is much simpler. There is no dyarchy in the Provincial legislature nor are there State representatives. Further, all the members have a common interest as all matters before the Legislature deal with the Province; whereas in the Federal Legislature, as explained above, the members representing a particular unit will be interested in advancing the interest of that unit, and will have but little in common with the others. The only difficulty in the way of the formation of a strong party system and the establishment of Cabinet responsibility in the Provinces is that due to the system of communal representation. But this difficulty may well be solved in time when the ministers realize their responsibilities and have acquired the habit of joint consultation and deliberation and of acting as a united body in face of a critical Legislature. So in course of time, one may reasonably expect that in the Provinces at any rate, there will be the establishment of a party system and of collective ministerial responsibility. By the practice of working together for certain common interest, economic and political, the members will acquire the habit of toleration. Any clash of interest in the Legislature will tend in future to have an economic, rather than a communal, origin; and it may not be unreasonable to expect that there will be developed in the Provincial legislature parties which will cut across communal lines. Then collective responsibility of the ministry will follow, established by constitutional convention enforced by usages and practice.

So far as the Provinces are concerned, one may fairly come to the conclusion that given the guidance of sympathetic statesman with experience of the English political system, at the head of the Provincial Government, there is no reason why there should not be established in the Provincial legislature the system of Cabinet responsibility founded on a strong party system.

APPENDIX III

ORDERS IN COUNCIL

(Made up to June 1938)

	Government of India	Sections, etc. affected
1.	(Constitution of Orissa) Order, 1936 (*cf. No.* 19).	289 (1) and (2).
2.	(Constitution of Sind) Order, 1936 (*cf. No.* 19)	289 (1) and (2).
3.	(Excluded and Partially Excluded Areas) Order, 1936.	91 (1).

	Government of India	Sections, etc. affected.
4.	(Scheduled Castes) Order, 1936 ..	Schedules 1, 5 and 6.
5.	(Provincial Legislative Assemblies) Order, 1936.	291 and Schs. 5 and 6.
6.	(Provincial Legislative Councils) Order, 1936	291 and Sch. 5.
7.	(Distribution of Revenues) Order, 1936 ..	138 (1) and (2), 140 (2), 142, Pt. XIII.
8.	(Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936. [*Para.* 8 (2) *of part III amended by Order No.* 19]	291 and 69 (1).
9.	(Commencement and Transitory Provisions) Order, 1936.	320 and 310.
10.	The India and Burma (Income-tax Relief) Order, 1936.	159.
11.	(India Office Pensions) Order, 1936 ..	281 (1), (3) and (6), and 282 (1).
12.	The Aden Colony Order, 1936	288, 311 (5).
13.	(Governors' Allowances and Privileges) Order, 1936.	Sch. 3, para. 2–4, 5.
14.	(Federal Court) Order, 1936	200 (1), 201 and Order 9.
15.	(Federal Court) Order, 1937	215.
16.	(Audit and Accounts) Order, 1936 ..	166 (2) and 170 (3).
17.	(Commencement and Transitory Provisions) (No. 2) Order, 1936.	119, 145, 320 and 310 and Order 9.
18.	(Federal Legislature Amendment) Order, 1936	308 (4), Sch. 1, Part II.
19.	(Provincial Legislatures) (Miscellaneous Provisions) Order, 1936.	291, 309 (2), 310 and Schs. 5 and 6.
20.	(Family Pension Funds) Order, 1936 ..	273 and 310.
21.	(Defence Appointments) Order, 1936 ..	233.
22.	The India and Burma (Burma Monetary Arrangements) Order, 1937.	158 and 293.
23.	(High Court Judges) Order, 1937 ..	220 (1), and 221.
24.	(High Court Judges) (Amendment) Order, 1937.	Para. 2 (1) and Sch. 1, Principal Order.
25.	(High Court Judges) (Amendment) Order, 1938.	Para. 27, Principal Order.
26.	The India and Burma (Transitory Provisions) Order, 1937.	310 and 309 (2), and Schedule 3, para. 2.
27.	(Adaptation of Acts of Parliament) Order, 1937.	311 (5) and 178 (2).
28.	(Adaptation of Indian Laws) Order, 1937 ..	293.
29.	(Adaptation of Indian Laws) Supplementary Order, 1937.	Schedules, Principal Order.
30.	The India and Burma (Trade Regulation) Order, 1937.	160.
31.	The India, Burma and Aden (Transitory Provisions) (Taxation) Order, 1937.	310.
32.	The Indian (Foreign Jurisdiction) Order, 1937	294.

APPENDIX IV

GOVERNMENT OF INDIA ACT (AMENDMENT) ACT, 1939

In this Schedule are printed: (1) the Government of India Act (Amendment) Act, 1939—2 and 3 Geo. 6. c. 66; (2) Instrument of Instructions to the Governor-General; and (3) Instrument of Instructions to the Governor of Bengal, which is practically the same for the Governors of other Provinces. 2 and 3 Geo. 6. c. 66

An Act to amend the Government of India Act, 1935.
[1st September 1939]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Amendments as to Proclamations of Emergency 26 and 27 Geo. 5. c. 2

1.—(1) After section one hundred and twenty-six of the Government of India Act, 1935, there shall be inserted the following section:

'126A. Where a Proclamation of Emergency is in operation whereby the Governor-General has declared that the security of India is threatened by war—

(*a*) the executive authority of the Federation shall extend to the giving of directions to a Province as to the manner in which the executive authority thereof is to be exercised, and any directions so given shall for the purposes of the last preceding section be deemed to be directions given thereunder;

(*b*) any power of the Federal Legislature to make laws for a Province with respect to any matter shall include power to make laws as respects a Province conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Federation or officers and authorities of the Federation as respects that matter, notwithstanding that it is one with respect to which the Provincial Legislature also has power to make laws:

Provided that no Bill or amendment which, as respects a Province, confers powers or imposes duties, or authorises the conferring of powers or the imposition of duties, upon the Federation or upon officers or authorities of the Federation in relation to

such a matter as aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency.'

(2) The following consequential amendment shall, for the avoidance of doubt, be made in subsections (2) and (3) of section one hundred and twenty-four of the said Act, that is to say, after the word 'duties' there shall be inserted the words 'or authorise the conferring of powers and the imposition of duties'.

(3) At the end of section one hundred and two of the said Act, there shall, for the avoidance of doubt, be inserted the following subsection—

'(5) A Proclamation of Emergency declaring that the security of India is threatened by war or by internal disturbance may be made before the actual occurrence of war or of any such disturbance if the Governor-General in his discretion is satisfied that there is imminent danger thereof.'

Short title and commencement

2.—(1) This Act may be cited as the Government of India Act (Amendment) Act, 1939.

(2) This Act shall be deemed to have come into operation on the commencement of Part III of the Government of India Act, 1935.

INDIA

INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor-General of India

Dated 8th March 1937 GEORGE R. I.

INSTRUCTIONS TO OUR GOVERNOR-GENERAL OF INDIA

GIVEN at Our Court at Buckingham Palace the Eighth day of March 1937 in the First year of Our Reign

WHEREAS by Letters Patent bearing date the fifth day of March Nineteen hundred and thirty-seven We have made permanent provision for the office of Governor-General of India:

AND WHEREAS by those Letters Patent and by the Government of India Act, 1935 (hereinafter called 'the Act') certain powers, functions and authority for the Government of India are declared to be vested in the Governor-General:

AND WHEREAS His late Majesty King George V did before the enactment of the Act issue certain Instructions under His Royal Sign Manual to Our said Governor-General bearing date the fifteenth day of

March nineteen hundred and twenty-one, and did subsequently amend the same:

AND WHEREAS the impending commencement of Part III of the Act has rendered it necessary to revoke the said Instructions:

AND WHEREAS without prejudice to the provision in the Act that Our Governor-General shall be under the general control of and comply with such particular directions, if any, as may from time to time be given by Our Secretary of State and to the duty of Our Governor-General to give effect to any Instructions so received, We are minded to make general provision regarding the manner in which during the operation of the provisions of Part XIII of the Act Our said Governor-General shall execute all things which according to the Act and the said Letters Patent belong to his office and to the trust which we have reposed in him:

NOW, THEREFORE, We do by these Our Instructions under Our Royal Sign Manual hereby revoke the aforesaid Instructions and declare Our pleasure to be as follows:

A.—INTRODUCTORY

I. Under these Our Instructions, unless the context otherwise require, the term 'Governor-General' shall include every person for the time being acting as Governor-General according to the provisions of the Act.

II. Our Governor-General shall, with all due solemnity, cause Our Commission under Our Royal Sign Manual appointing him to be read and published in the presence of the Chief Justice of India for the time being or, in his absence, other Judge of the Federal Court, and of so many of the members of the Executive Council of Our Governor-General as may conveniently be assembled.

III. Our Governor-General shall take the oath of allegiance and the oath for the due execution of the office of Our Governor-General of India and for the due and impartial administration of justice, in the form hereto appended, which oaths the said Chief Justice or, in his absence, any Judge of the Federal Court, shall, and is hereby required to, tender and administer unto him.

IV. And We do authorise and require Our Governor-General by himself or by any other person to be appointed by him in that behalf to administer to every person appointed by Us or by the Governor-General in Council to be a member of the Governor-General's Executive Council and to every person appointed by him to be a Chief Commissioner the oaths of allegiance and of office and of secrecy hereto appended.

V. And We do further direct that every person who under these Instructions shall be required to take an oath may make an affirmation in place of an oath if he has any objection to making an oath.

VI. The provisions of the last four preceding paragraphs shall not apply to any person holding office at the date of the commencement of Part III of the Act.

B.—IN REGARD TO THE EXECUTIVE AUTHORITY OF THE GOVERNOR-GENERAL IN COUNCIL

VII. It is Our will and pleasure that Our Governor-General shall use all endeavour consistent with the fulfilment of his responsibilities to Us and to Our Parliament for the welfare of Our Indian subjects, that the administration of the matters committed to the charge of Our Governor-General in Council may be conducted in harmony with the wishes of

Our said subjects as expressed by their representatives in the Indian Legislature so far as the same shall appear to him to be just and reasonable: and shall so order the administration of his government as to further the policy of the Act for its conversion into a Federation of all India.

C.—In regard to Relations between the Governor-General in Council and the Provinces

VIII. Whereas it is expedient for the common good of British India that the authority of Our Governor-General in Council and of the Indian Legislature in those matters which are by law assigned to them should prevail:

And whereas at the same time it is the purpose of the Act that the Governments and Legislatures of the Provinces should be free in their own sphere to pursue their own policy:

And whereas in the interest of the harmonious co-operation of the several members of the body politic, the Act has empowered Our Governor-General to exercise, at his discretion, certain powers affecting the relations between his Government and the Provinces:

It is Our will and pleasure that Our Governor-General in the exercise of these powers should give unbiased consideration as well to the views of the Governments of the Provinces as to those of his own Government whenever those views are in conflict and, in particular, when it falls to him to exercise his power to issue orders to the Governor of a Province for the purpose of securing that the executive authority of the Governor-General in Council is not impeded or prejudiced, or his power to determine whether Provincial law or Central law shall regulate a matter in the sphere in which both Legislatures have power to make laws.

IX. It is Our desire that Our Governor-General shall by all reasonable means encourage consultation with a view to common action between his Government and the Provinces and between the Provinces themselves. It is further Our will and pleasure that Our Governor-General shall endeavour to secure the co-operation of the Provincial Governments in the maintenance of such Central agencies and institutions for research as may serve to assist the conduct by Provincial Governments of their own affairs.

X. In particular We require Our Governor-General before giving his previous sanction to any legislative proposal which it is proposed to introduce in the Indian Legislature for the imposition or variation of taxes or duties by which the revenues of the provincial Governments are or may be directly affected or for varying the meaning of the expression 'agricultural income', or for alteration of the principles on which under the provisions of the Act moneys are or may be distributed to the Provinces, to ascertain by the method which appears to him best suited to the circumstances of each case the views of those Governments upon the proposal.

XI. Before granting his previous sanction to the introduction into the Indian Legislature of any Bill or amendment wherein it is proposed to authorise the Governor-General in Council to give directions to a Province as to the carrying into execution in that Province of any Act of the Indian Legislature relating to a matter specified in Part II of the Concurrent Legislative List appended to the Act, it is Our will and pleasure that Our Governor-General shall take care to see that the Governments of the Provinces which would be affected by any such

measure have been duly consulted upon the proposal, and upon any other proposals which may be contained in any such measure which involve the imposition of expenditure upon the revenues of the Provinces.

XII. In considering whether he shall give his assent to any Provincial law *relating to a matter enumerated in the Concurrent* Legislative List, which has been reserved for his consideration on the ground that it contains provisions repugnant to the provisions of an Act of the Indian Legislature, Our Governor-General, while giving full consideration to the proposals of the Provincial Legislature, shall have due regard to the importance of preserving substantially unimpaired the uniformity of law which the Indian Codes have hitherto embodied.

D.—Matters affecting the Legislature

XIII. Without prejudice to the generality of his powers as to reservation of Bills, Our Governor-General shall not assent in Our name, to, but shall reserve for the signification of Our pleasure, any Bill of any of the classes herein specified, that is to say:—

(*a*) any Bill the provisions of which would repeal or be repugnant to the provisions of any Act of Parliament extending to British India;

(*b*) any Bill which in his opinion would, if it became law, so derogate from the powers of the High Court of any Province as to endanger the position which those Courts are by the Act designed to fill;

(*c*) any Bill regarding which he feels doubt whether it does, or *does not, offend against the purposes of Chapter III,* Part V, or section 299 of the Act;

(*d*) any Bill passed by a Provincial Legislature and reserved for his consideration which would alter the character of the Permanent Settlement.

XIV. It is further Our will and pleasure that in pursuance of the Agreement made between Us and His Exalted Highness the Nizam of Hyderabad as contemplated in Part III of the Act, Our Governor-General in declaring his assent in Our name to any Bill of the Legislature of the Central Provinces and Berar which has been reserved for his consideration, shall declare that his assent to the Bill in its application to Berar has been given by virtue of the Agreement between Us and His Exalted Highness the Nizam.

E.—General

XV. And generally Our Governor-General shall do all that in him lies to maintain standards of good administration; to promote all measures making for moral, social and economic welfare and tending to fit all classes of the population to take their due share in public life; and to secure amongst all classes and creeds co-operation, goodwill and mutual respect for religious beliefs and sentiments; and he shall further have regard to this Instruction in the exercise of the powers by law conferred *upon him in relation to* matters whether of legislation or of executive government.

XVI. And finally it is Our will and pleasure that Our Governor-General should so exercise the trust reposed in him that the partnership between India and the United Kingdom within Our Empire may be furthered, to the end that India may attain its due place among our Dominions.

XVII. And We do hereby charge Our Governor-General to communicate these Our Instructions to the Members of his Executive Council and to publish the same in such manner as he may think fit.

APPENDIX

FORM OF OATH OF ALLEGIANCE

I, , do swear that I will be faithful and bear true allegiance to His Majesty, King George the Sixth, Emperor of India, His Heirs and Successors, according to Law.

So help me God.

FORM OF OATH OF OFFICE

I, , do swear that I will well and truly serve Our Sovereign, King George the Sixth, Emperor of India, in the Office of , and that I will do right to all manner of people after the laws and usages of India, without fear or favour, affection or ill-will.

So help me God.

FORM OF OATH OF SECRECY FOR EXECUTIVE COUNCILLORS

I, , do swear that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration, or shall become known to me as a member of the Governor-General's Executive Council, except as may be required for the due discharge of my duties as such member, or as may be specially permitted by the Governor-General.

So help me God.

INDIA

INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor of Bengal

Dated 8th March 1937 GEORGE R. I.

INSTRUCTIONS TO OUR GOVERNOR FOR THE TIME BEING OF BENGAL

GIVEN at Our Court at Buckingham Palace the Eighth day of March 1937 in the First year of Our Reign

WHEREAS by Letters Patent bearing date the Fifth day of March, Nineteen hundred and thirty-seven We have made permanent provision for the Office of Governor of Bengal:

AND WHEREAS by those Letters Patent and by the Act of Parliament passed on the second day of August, Nineteen hundred and thirty-five and entitled the Government of India Act, 1935 (hereinafter called 'the Act'), certain powers, functions and authority for the Government of the Province of Bengal are declared to be vested in the Governor as Our Representative:

AND WHEREAS, without prejudice to the provision in the Act that in certain regards therein specified the Governor shall act according to instructions received from time to time from Our Governor-General and to the duty of Our Governor to give effect to instructions so received,

We are minded to make general provision regarding the due manner in which Our said Governor shall execute all things which, according to the Act and the said Letters Patent, belong to his Office, and to the trust which We have reposed in him:

AND WHEREAS a draft of these Instructions has been laid before Parliament in accordance with the provisions of sub-section (1) of section fifty-three of the Act and an Address has been presented to Us by both Houses of Parliament praying that instructions may be issued in the terms of these Instructions:

NOW, THEREFORE, We do by these Our Instructions under Our Sign Manual and Signet declare Our pleasure to be as follows:

A.—INTRODUCTORY

I. Under these, Our Instructions, unless the context otherwise require, the term 'Governor' shall include every person for the time being acting as Governor according to the provisions of the Act.

II. Our Governor for the time being shall, with all due solemnity, cause Our Commission under Our Sign Manual appointing him to be read and published in the presence of the Chief Justice for the time being, or, in his absence, other Judge, of the High Court of the Province.

III. Our said Governor shall take the oath of allegiance and the oath for the due execution of the Office of Our Governor of Bengal, and for the due and impartial administration of justice, in the form hereto appended, which oaths the Chief Justice for the time being, or in his absence any Judge of the High Court, shall, and he is hereby required to, tender and administer unto him.

IV. And We do authorise and require Our Governor, by himself or by any other person to be authorised by him in that behalf, to administer to every person appointed by him to hold office as a member of the Council of Ministers the oaths of office and of secrecy hereto appended.

V. And We do further direct that every person who under these Instructions shall be required to take an oath may make an affirmation in place of an oath if he has any objection to making an oath.

VI. And whereas great prejudice may happen to Our service by the absence of Our Governor, he shall not quit India during his term of office without having first obtained leave from Us under Our Sign Manual or through one of Our Principal Secretaries of State.

B.—IN REGARD TO THE EXECUTIVE AUTHORITY OF THE PROVINCE

VII. In making appointments to his Council of Ministers Our Governor shall use his best endeavours to select his Ministers in the following manner, that is to say, to appoint in consultation with the person who in his judgment is most likely to command a stable majority in the Legislature those persons (including so far as practicable members of important minority communities) who will best be in a position collectively to command the confidence of the Legislature. In so acting, he shall bear constantly in mind the need for fostering a sense of joint responsibility among his Ministers.

VIII. In all matters within the scope of the executive authority of the Province, save in relation to functions which he is required by or under the Act to exercise in his discretion, Our Governor shall in the exercise of the powers conferred upon him be guided by the advice of his Ministers, unless in his opinion so to be guided would be inconsistent with

the fulfilment of any of the special responsibilities which are by the Act committed to him, or with the proper discharge of any of the functions which he is otherwise by or under the Act required to exercise in his individual judgment; in any of which cases Our Governor shall, notwithstanding his Ministers' advice, act in exercise of the powers by or under the Act conferred upon him in such manner as to his individual judgment seems requisite for the due discharge of the responsibilities and functions aforesaid. But he shall be studious so to exercise his powers as not to enable his Ministers to rely upon his special responsibilities in order to relieve themselves of responsibilities which are properly their own.

IX. Our Governor shall interpret his special responsibility for the safeguarding of the legitimate interests of minorities as requiring him to secure, in general, that those racial or religious communities for the members of which special representation is accorded in the Legislature, and those classes of the people committed to his charge who, whether on account of the smallness of their number or their primitive condition or their lack of educational or material advantages or from any other cause, cannot as yet fully rely for their welfare upon joint political action in the Legislature, shall not suffer, or have reasonable cause to fear, neglect or oppression. But he shall not regard as entitled to his protection any body of persons by reason only that they share a view on a particular question which has not found favour with the majority.

Further, Our Governor shall interpret the said special responsibility as requiring him to secure a due proportion of appointments in Our Services to the several communities, and, so far as there may be in his Province at the date of the issue of these Our Instructions an accepted policy in this regard, he shall be guided thereby, unless he is fully satisfied that modification of that policy is essential in the interests of the communities affected or of the welfare of the public.

X. In the discharge of his special responsibility for the securing to members of the public services of any rights provided for them by or under the Act and the safeguarding of their legitimate interests Our Governor shall be careful to safeguard the members of Our services not only in any rights provided for them by or under the Act or any other law for the time being in force, but also against any action which, in his judgment, would be inequitable.

XI. The special responsibility of Our Governor for securing in the sphere of executive action any of the purposes which the provisions of Chapter III of Part V of the Act are designed to secure in relation to legislation shall be construed by him as requiring him to differ from his Ministers if in his individual judgment their advice would have effects of the kind which it is the purpose of the said Chapter to prevent, even though the advice so tendered to him is not in conflict with any specific provision of the Act.

XII. Our Governor shall construe his special responsibility for the protection of the rights of any Indian State as requiring him to see that no action shall be taken by his Ministers which would imperil the economic life of any State, or affect prejudicially any right of any State heretofore or hereafter recognised, whether derived from treaty, grant, usage, sufferance or otherwise: and he shall refer to Our Governor-General any questions which may arise as to the existence of any such right.

XIII. In the framing of rules for the regulation of the business of the Provincial Government Our Governor shall ensure that, amongst

other provisions for the effective discharge of that business, due provision is made that the Finance Minister shall be consulted upon any proposal by any other Minister which affects the finances of the Province: and further that no reappropriation within a Grant shall be made by any Department other than the Finance Department, except in accordance with such rules as the Finance Minister may approve; and that in any case in which the Finance Minister does not concur in any such proposal the matter shall be brought for decision before the Council of Ministers. He shall further in those rules make due provision to secure that prompt attention is paid to any representation received by his Government from any minority.

XIV. Having regard to the powers conferred by the Act upon Our Secretary of State to appoint persons to Our Service if, in his opinion, circumstances arise which render it necessary for him so to do in order to secure efficiency in irrigation, Our Governor shall make it his care to see that he is kept constantly supplied with information as to the conduct of irrigation in his Province in order that he may, if need be, place this information at the disposal of Our Governor-General.

XV. In the exercise of the powers by law conferred upon him in relation to the administration of areas declared under the Act to be Excluded or Partially Excluded Areas, or to the discharge of his special responsibility for the safeguarding of the legitimate interests of minorities, Our Governor shall, if he thinks this course would enable him the better to discharge his duties to the inhabitants of those areas or to primitive sections of the population elsewhere, appoint an officer with the duty of bringing their needs to his notice and advising him regarding measures for their welfare.

C.—Matters affecting the Legislature

XVI. In determining whether he shall in Our name give his assent to, or withhold his assent from, any Bill, Our Governor shall, without prejudice to the generality of his power to withhold his assent on any ground which appears to him in his discretion to render such action necessary or expedient, have particular regard to the bearing of the provisions of the Bill upon any of the special responsibilities imposed upon him by the Act.

XVII. Without prejudice to the generality of his powers as to reservation of Bills, Our Governor shall not assent in Our name to, but shall reserve for the consideration of Our Governor-General, any Bill of any of the classes herein specified, that is to say:—

(a) any Bill the provisions of which would repeal or be repugnant to the provisions of any Act of Parliament extending to British India;

(b) any Bill which in his opinion would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by the Act designed to fill;

(c) any Bill regarding which he feels doubt whether it does, or does not, offend against the purposes of Chapter III of Part V or section 299 of the Act;

(d) any Bill which would alter the character of the Permanent Settlement.

And in view of the provisions in this clause of these Our Instructions, it is Our will and pleasure that if his previous sanction is required under the Act to the introduction of any Bill of the last-mentioned description Our Governor shall not withhold that sanction to the introduction of the Bill.

XVIII. It is Our will that the power vested by the Act in Our Governor to stay proceedings upon a Bill, clause or amendment in the Provincial Legislature in the discharge of his special responsibility for the prevention of grave menace to peace and tranquillity shall not be exercised unless, in his judgment, the public discussion of the Bill, clause or amendment would itself endanger peace and tranquillity.

XIX. It is Our will and pleasure that the seats in the Legislative Council to be filled by the nomination of Our Governor shall be so apportioned as in general to redress, so far as may be, inequalities of representation which may have resulted from election, and in particular to secure representation for women and the Scheduled Castes in that Chamber.

D.—General

XX. And generally Our Governor shall do all that in him lies to maintain standards of good administration; to promote all measures making for moral, social and economic welfare and tending to fit all classes of the population to take their due share in the public life and government of the Province; and to secure amongst all classes and creeds co-operation, goodwill and mutual respect for religious beliefs and sentiments; and he shall further have regard to this Instruction in the exercise of the powers by law conferred upon him in relation to matters whether of legislation or of executive government.

XXI. And We do hereby charge Our Governor to communicate these Instructions to His Ministers and to publish the same in his Province in such manner as he may think fit.

APPENDIX

Form of Oath of Allegiance

I, , do swear that I will be faithful and bear true allegiance to His Majesty, King George the Sixth, Emperor of India, His Heirs and Successors, according to Law.

So help me God.

Form of Oath of Office

I, , do swear that I will well and truly serve Our Sovereign, King George the Sixth, Emperor of India, in the Office of , and that I will do right to all manner of people after the laws and usages of India, without fear or favour, affection or ill-will.

So help me God.

Form of Oath of Secrecy for Ministers

I, , do swear that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration, or shall

become known to me as a Minister in Bengal, except as may be required for the due discharge of my duties as such Minister or as may be specially permitted by the Governor in the case of any matter pertaining to the functions to be exercised by him in his discretion.

So help me God.

APPENDIX V

INDIA AND BURMA (MISCELLANEOUS AMENDMENTS) ACT, 1940

[3 & 4 Geo. 6. Ch. 5]

Arrangement of Sections

Provisions applicable only to India

An Act to amend the Government of India Act, 1935, and the Government of Burma Act, 1935, in certain respects, and to make a consequential amendment

in the Naval Discipline Act; and for purposes connected with the matters aforesaid.

[31st January 1940]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Provisions applicable only to India

Amendment of the provisions as to taxes on income and corporation tax. 26 Geo. 5 & 1 Edw. 8. c. 2

1.—(1) In subsection (2) of section three hundred and eleven of the Government of India Act, 1935 (hereafter in this Act referred to as 'the principal Act') for the definition of 'corporation tax' there shall be substituted the following definition:—

' "corporation tax" means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled:—

(*a*) that it is not chargeable in respect of agricultural income;

(*b*) that no deduction in respect of the tax paid by companies is, by any enactments which may apply to the tax, authorised to be made from dividends payable by the companies to individuals;

(*c*) that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income-tax the total income of individuals receiving such dividends, or in computing the Indian income-tax payable by, or refundable to, such individuals;'

and after the definition of 'taxation,' there shall be inserted the following definition:—

' "tax on income" includes a tax in the nature of an excess profits tax.'

(2) At the end of subsection (1) of section one hundred and thirty-eight of the principal Act (which provides for the distribution to Provinces and Federated States of the proceeds of Federal taxes on income after deducting proceeds attributable to Chief Commissioners' Provinces or to taxes payable in respect of Federal emoluments) there shall be inserted the following paragraph:—

'For the purposes of this subsection, in each financial year one per cent, or such other percentage

as may be prescribed, of so much of the net proceeds of taxes on income as does not represent the net proceeds of taxes payable in respect of Federal emoluments shall be deemed to represent proceeds attributable to Chief Commissioners' Provinces.'

(3) In subsection (2) of the said section one hundred and thirty-eight (which relates to the retention by the Federation of moneys assigned by that section to Provinces and States), after the words 'such sum as may be prescribed' there shall be inserted the words 'or, if it is so prescribed, the whole of those moneys.'

Taxes on professions, trades, callings and employments

2.—(1) After section one hundred and forty-two of the principal Act there shall be inserted the following section:—

'142A.—(1) Notwithstanding anything in section one hundred of this Act, no Provincial law relating to taxes for the benefit of a Province or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the Province or to any one municipality, district board, local board, or other local authority in the Province by way of taxes on professions, trades, callings and employments shall not, after the thirty-first day of March nineteen hundred and thirty-nine, exceed fifty rupees per annum:

Provided that, if in the financial year ending with that date there was in force in the case of any Province or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded fifty rupees per annum, the preceding provisions of this subsection shall, unless for the time being provision to the contrary is made by a law of the Federal Legislature, have effect in relation to that Province, municipality, board or authority as if for the reference to fifty rupees per annum there were substituted a reference to that rate or maximum rate, or such lower rate, if any, (being a rate greater than fifty rupees per annum) as may for the time being be fixed by a law of the Federal Legislature; and any law

of the Federal Legislature made for any of the purposes of this proviso may be made either generally or in relation to any specified Provinces, municipalities, boards or authorities.

(3) The fact that the Provincial Legislature has power to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting, in relation to professions, trades, callings and employments, the generality of the entry in the Federal Legislative List relating to taxes on income.'

(2) After paragraph 54 of the Federal Legislative List there shall be inserted the following paragraph:—

'54A. The matters specified in the proviso to subsection (2) of section one hundred and forty-two A of this Act as matters with respect to which provision may be made by laws of the Federal Legislature.'

(3) For paragraph 46 of the Provincial Legislative List there shall be substituted the following paragraph:—

'46. Taxes on professions, trades, callings and employments, subject, however, to the provisions of section one hundred and forty-two A of this Act.'

Amendments as to certain items in Legislative Lists

3.—(1) In paragraph 2 of the Federal Legislative List after the words 'local self-government in cantonment areas (not being cantonment areas of Indian State troops)' there shall be inserted the words 'the constitution and powers within such areas of cantonment authorities.'

(2) After paragraph 48 of the Provincial Legislative List there shall be inserted the following paragraphs:—

'48A. Taxes on vehicles suitable for use on roads, whether mechanically propelled or not, including tramcars.

48B. Taxes on the consumption or sale of electricity, subject, however, to the provisions of section one hundred and fifty-four A of this Act.'

(3) After section one hundred and fifty-four of the principal Act there shall be inserted the following section:—

Exemptions from taxes on electricity

'154A. Save in so far as any Federal law may otherwise provide, no Provincial law or law of a Federated State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—

(*a*) consumed by the Federal Government, or sold to the Federal Government for consumption by that Government; or

(*b*) consumed in the construction, maintenance or operation of a Federal Railway by the Federal Railway Authority or a railway company operating that Railway, or sold to that Authority or any such railway company for consumption in the construction, maintenance or operation of a Federal Railway;

and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Federal Government for consumption by that Government, or to the Federal Railway Authority or any such railway company as aforesaid for consumption in the construction, maintenance or operation of a Federal Railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity.'

Amendments of ss. 88, 89 and 90

4.—(1) At the end of subsection (3) of section eighty-eight of the principal Act there shall be inserted the following proviso:—

'Provided that, for the purposes of the provisions of this Act relating to the effect of an Act of a Provincial Legislature which is repugnant to an Act of the Federal Legislature or an existing Indian Law with respect to a matter enumerated in the Concurrent Legislative List, an ordinance promulgated under this section in pursuance of instructions from the Governor-General, acting in his discretion, shall be deemed to be an Act of the Provincial Legislature which has been reserved for the consideration of the Governor-General and assented to by him.'

(2) For the proviso to subsection (1) of the said section eighty-eight there shall be substituted the following proviso:—

'Provided that the Governor—

(*a*) shall exercise his individual judgment as respects the promulgation of any ordinance under this section, if—

(i) a Bill containing the same provisions would under this Act have required his or the Governor-General's previous sanction to the introduction thereof into the Legislature; or

(ii) an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, it had received the assent of the Governor-General or of His Majesty; and

(*b*) shall not without instructions from the Governor-General, acting in his discretion, promulgate any such ordinance if—

(i) a Bill containing the same provisions would under this Act have required the Governor-General's previous sanction for the introduction thereof into the Legislature; or

(ii) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the Governor-General; or

(iii) an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, it had received the assent of the Governor-General or of His Majesty.'

(3) In the proviso to subsection (4) of section eighty-nine, and the proviso to subsection (3) of section ninety, of the principal Act, after the words 'repugnant to an Act of the Federal Legislature' there shall be inserted the words 'or an existing Indian Law with respect to a matter enumerated in the Concurrent Legislative List.'

Power to appoint acting puisne judges of the Federal Court

5. At the end of section two hundred and two of the principal Act there shall be inserted the following sub-section:—

'(2) If the office of any other judge of the Federal Court becomes vacant, or if any such judge

is appointed to act temporarily as Chief Justice of India or is by reason of absence, or for any other reason, unable to perform the duties of his office, the Governor-General may in his discretion appoint a judge of a High Court who is duly qualified for appointment as a judge of the Federal Court to act temporarily as a judge of that court, and the person so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, be deemed to be a judge of the Federal Court until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the permanent judge has resumed his duties.'

Amendment of s. 219 (1)

6. For the proviso to subsection (1) of section two hundred and nineteen of the principal Act (which enumerates the Courts in British India which are to be deemed to be High Courts for the purpose of that Act) there shall be substituted the following proviso,—

'Provided that, if provision has been made, whether before or after the commencement of Part III of this Act—

(*a*) by His Majesty by Letters Patent for the establishment of a High Court to replace any Court or Courts mentioned in this subsection; or

(*b*) by the appropriate Legislature in India for the establishment of a Chief Court to replace the Judicial Commissioner's Court in the North-West Frontier Province, or the Judicial Commissioner's Court in Sind,

then, as from the establishment of the new court, this section shall have effect as if the new court were mentioned therein in lieu of the court or courts so replaced.'

Amendment of Legislative Lists with respect to universities

7.—(1) For paragraph 17 of the Provincial Legislative List there shall be substituted the following paragraph:—

'17. Education, including Universities other than those specified in paragraph 13 of List I.'

(2) The Federal Legislature shall not by virtue of paragraph 33 of the Federal Legislative List (which relates to corporations and, in particular, to corporations, whether

trading or not, with objects not confined to one unit), and the Provincial Legislature shall not by virtue of paragraph 33 of the Provincial Legislative List (which relates to other corporations) have power to make any law with respect to universities, and accordingly—

(*a*) at the end of the first of those paragraphs, there shall be added the words 'but not including Universities'; and

(*b*) in the second of those paragraphs, for the words 'other than corporations specified in List I' there shall be substituted the words 'not being corporations specified in List I or Universities.'

(3) This section shall come into operation on the first day of April nineteen hundred and forty.

Amendment of definition of 'Indian State'

8. In subsection (1) of section three hundred and eleven of the principal Act for the definition of 'Indian State' there shall be substituted the following definition:—

"'Indian State' means any territory, not being part of British India, which His Majesty recognises as being such a State, whether described as a State, an Estate, a Jagir or otherwise;".

Amendment of s. 262

9. As from the first day of April nineteen hundred and forty the following amendments shall be made in section two hundred and sixty-two of the principal Act (which relates to the eligibility for office of persons who are not British subjects):—

(*a*) in subsections (1) and (2), for the words 'any subject of a specified Indian State' there shall, in both places, be substituted the words 'the subjects, or any named subject, of a specified Indian State'; for the words 'any native of a specified tribal area or territory adjacent to India' there shall, in both places, be substituted the words 'the natives, or any named native, of a specified tribal area or territory adjacent to India', and the words 'being an office specified in the declaration' shall, in both places, be omitted;

(*b*) in subsection (4), after the words 'Provided that' there shall be inserted the following paragraph:—

'(*a*) a person who at the end of March nineteen hundred and forty is in the per-

manent service of the Crown in India shall not be ineligible to hold any office under the Crown in India by reason that he is not a British subject; and

(*b*)'.

10.—(1) In subsection (2) of section two hundred and seventy-three of the principal Act (which relates to family pension funds)— Provisions as to family pension funds

(*a*) for the words 'the balance in the hands of the Governor-General on the thirty-first day of March next following the passing of this Act' there shall be substituted the words 'the balance in the hands of the Secretary of State in Council on the thirty-first day of March nineteen hundred and thirty-seven';

(*b*) for the words 'three years', in both places where those words occur, there shall be substituted the words 'two years';

and in subsection (3) of the said section for the words 'the Governor-General' there shall be substituted the words 'the Secretary of State in Council.'

(2) The Government of India (Family Pension Funds) Order, 1936, shall have effect and be deemed always to have had effect as if, in paragraphs ten, sixteen, twenty-two and twenty-five thereof, for the words 'nineteen hundred and thirty-six' there were substituted the words 'nineteen hundred and thirty-seven.'

11. After section two hundred and eighty-four of the principal Act there shall be inserted the following section:— Confirmation of appointments to India Office staff and staff of Auditor of Indian Home Accounts

'284A.—(1) Any appointments which the Secretary of State in Council has purported to make to his permanent establishment before the commencement Part III of this Act, and any increases which he has purported to make in the salaries of persons on that establishment, shall for all purposes be deemed to have been validly made notwithstanding that the making thereof was not sanctioned by an Order of His Majesty in Council as provided by section seventeen of the Government of India Act.

(2) Any appointments which the Auditor of the accounts of the Secretary of State in Council has

purported to make to his staff before the commencement of the said Part III shall be deemed to have been validly made notwithstanding that the making thereof was not authorised by such a warrant of His Majesty as is mentioned in section twenty-seven of the Government of India Act, and all salaries paid to any person on the said Auditor's staff shall be deemed to have been duly paid notwithstanding that they were not so authorised.'

Provisions as to pensions of home civil servants appointed to offices in India. 50 & 51 Vict. c. 67

12. After section three hundred and five of the principal Act there shall be inserted the following section:—

'305A.—(1) Where a civil servant, as defined by section twelve of the Superannuation Act, 1887, is appointed by His Majesty or by the Governor-General in his discretion to any office under the Crown in India, the Secretary of State may direct that his service in that office shall qualify for the grant of a pension or gratuity as if it were service rendered in the office held by him as a civil servant immediately before his appointment to service in India, and there shall be paid to, or in respect of, him out of the revenues of the Federation, and shall be charged on those revenues, in respect of his service in that office in India a pension or gratuity calculated in accordance with the Superannuation Acts, 1834 to 1935, and the orders, rules and regulations made thereunder, but on the basis of the salary of the office last held by him as a civil servant before his appointment to service in India:

Provided that nothing in the said Acts, orders, rules or regulations shall operate to prevent the grant of a pension to him with effect from the date on which he may relinquish office in India, notwithstanding that at that date he may not have attained the age of sixty.

(2) No such direction as aforesaid shall be given in relation to service in any office if the service of the person in question in that office would qualify for the grant of a pension without any such direction.

(3) This section shall apply to appointments made before the passing of this Act as well as to appointments made thereafter; and in relation to appointments made before the commencement of Part III of this Act, the reference to the Secre-

tary of State shall be construed as a reference to the Secretary of State in Council.'

Provisions applicable only to Burma

13–16. [Not printed here.]

General

17.—(1) The amendments made by this Act in the principal Act and the Government of Burma Act, 1935 (whether by way of substitution, addition or omission) shall, save where it is specifically provided that they shall come into operation on, or on some date subsequent to, the passing of this Act, be deemed to have been made in those Acts immediately before the passing thereof. Supplemental

(2) A copy of each of the said Acts giving effect to—

(*a*) the amendments made by this Act and the Government of India Act (Amendment) Act, 1939; and 2 & 3 Geo. 6. c. 66

(*b*) the amendments set out in the Schedule to this Act, being minor amendments previously made by Orders in Council in the Schedules to the said Acts,

shall be prepared and certified by the Clerk of the Parliaments, and deposited with the Rolls of Parliament, and His Majesty's printer shall print in accordance with the copy so certified all copies of the principal Act and the Government of Burma Act, 1935, which are printed after all the said amendments have come into operation.

18. This Act may be cited as the India and Burma (Miscellaneous Amendments) Act, 1940. Short title

SCHEDULE

Section 17

AMENDMENTS MADE IN THE SCHEDULES TO THE GOVERNMENT OF INDIA ACT, 1935, AND THE GOVERNMENT OF BURMA ACT, 1935, BY THE GOVERNMENT OF INDIA (FEDERAL LEGISLATURE AMENDMENT) ORDER, 1936, THE GOVERNMENT OF INDIA (PROVINCIAL LEGISLATIVE ASSEMBLIES) ORDER, 1936, THE GOVERNMENT OF BURMA (HOUSE OF REPRESENTATIVES) ORDER, 1936, THE GOVERNMENT OF BURMA (SENATE ELECTIONS) ORDER, 1936, AND THE GOVERNMENT OF BURMA (LEGISLATURE) (MISCELLANEOUS PROVISIONS) ORDER, 1936.

PART I

Amendments of Schedules to the Government of India Act, 1935

Schedule I

At the end of paragraph 12 of Part II of the First Schedule there shall be added the following sub-paragraph:—

'This paragraph shall have effect as if the State of Khaniadhana had been included in the Central India Agency on the first day of January nineteen hundred and thirty-five.'

In the fifth column in the Table of Seats appended to the said Part II the population of the States comprised in Division XVII, shall, instead of being stated as '3,032,197', be stated as '3,047,129', and the total population of the States in the Table shall, instead of being stated as '78,981,912', be stated as '78,996,844'.

Schedule V

In paragraph 12 of the Fifth Schedule for the words 'shall not be qualified to hold a seat' there shall be substituted the words 'shall not be qualified to be chosen to fill a seat'.

Schedule VI

In paragraph 6 of Part I of the Sixth Schedule the words 'or vote at any election to fill a general seat therein' shall be omitted.

At the end of paragraph 7 of the said Part I there shall be added the following provision:—

'If a person votes in more than one constituency in contravention of this paragraph, his votes in each of the constituencies shall be void.'

Sub-paragraph (7) of paragraph 13 of the said Part I shall be omitted.

In sub-paragraphs (*f*) and (*h*) of paragraph 9 of Part II of the said Schedule for the words 'is registered' there shall be substituted the words 'was on the last day of the previous fasli year registered'.

In sub-paragraph (*g*) of the said paragraph 9 for the word 'holds' there shall be substituted the words 'held throughout the previous fasli year'.

In sub-paragraph (*i*) of the said paragraph 9 for the words 'is a landholder' there shall be substituted the words 'was on the last day of the previous fasli year a registered landholder'.

In sub-paragraph (*j*) of the said paragraph 9 for the word 'holds' there shall be substituted the words 'held on the last day of the previous fasli year'.

After the said paragraph 9 there shall be inserted the following paragraph:—

'*Special qualification for Scheduled Castes*

9A. Subject to the provisions of Part I of this Schedule and to any overriding provisions of this Part of this Schedule, a person who is a member of the scheduled castes shall be qualified to be included in the electoral roll for any

territorial constituency if throughout the previous fasli year he occupied as owner or lessee a house in a municipality, a cantonment or an area subject to the jurisdiction of a local board, with an annual rent value of not less than eighteen rupees, or a house elsewhere with an annual rent value of not less than twelve rupees.'

For paragraph 10 of the said Part II there shall be substituted the following paragraph:—

'10. No person shall, by virtue of sub-paragraph (*e*) of paragraph 2, sub-paragraph (*c*) or sub-paragraph (*d*) of paragraph 3, paragraph 5 or paragraph 6 of this Part of this Schedule, or by virtue of her husband being a retired, pensioned or discharged officer, non-commissioned officer or soldier, be included in the electoral roll for any territorial constituency, unless application is made in the prescribed manner by, or if it is so prescribed, on behalf of, that person, that that person should be so included.'

At the end of paragraph 12 of the said Part II there shall be added the following sub-paragraph:—

'(3) References in this Part of this Schedule to, or to taxes payable in respect of, land or houses, relate exclusively to land or houses in the Province.'

At the end of paragraph 3 of Part V of the said Schedule there shall be inserted the words 'or, in the case of a member of the scheduled castes, if he is the owner or tenant of a house or building in the constituency the rental value whereof is not less than twelve rupees per annum.'

In paragraph 2 of Part VII of the said Schedule after the words 'or is assessed, otherwise than in the Santal Parganas, to chaukidari tax of an annual amount of not less than nine annas' there shall be inserted the words 'or, in the case of a member of the scheduled castes, of an annual amount of not less than six annas.'

In sub-paragraph (1) of paragraph 10 of Part VIII of the said Schedule after the definition of 'land revenue' there shall be inserted the following definition:—

"'municipal tax' means a tax imposed under the provisions of the Central Provinces Municipalities Act, 1922, or of that Act as applied to Berar."

Sub-paragraph (*b*) of paragraph 9 of Part IX of the said Schedule shall be omitted and at the end of that paragraph there shall be inserted the following paragraph:—

'*Special Provisions as to Shillong*

9A. In the case of any territorial constituency comprising any part of Shillong, any reference in this Part of this Schedule to "the constituency" shall be construed as including a reference to so much of the areas under the jurisdiction of the Shillong Municipal Board and the Shillong Cantonment Authority as is not part of British India, and any reference to municipal or cantonment rates or taxes shall be construed as including a reference to any such rates or taxes assessed by, or paid to, that Board or that Authority in the

exercise of any jurisdiction exercised by them in relation to areas outside British India.'

In the heading to paragraph 6 of Part XI of the said Schedule and in the said paragraph 6 the words 'the sub-division of' shall be omitted.

In sub-paragraph (*a*) of the said paragraph 6 after the words 'of not less than nine annas' there shall be inserted the words ' or, in the case of a member of the scheduled castes, of not less than six annas'.

In the heading to paragraph 8 of the said Part XI for the words 'and Vizagapatam and the Khondmals sub-division' there shall be substituted the words 'Koraput and Khondmals.'

In the said paragraph 8—

(i) after sub-paragraph (*a*) there shall be inserted the following sub-paragraph:—

'(*b*) if he is a member of the scheduled castes and is a village servant, whether hereditary or not; or' and sub-paragraph (*b*) shall be re-lettered '(*c*)';

(ii) for the words 'and Vizagapatam or in the Khondmals sub-division' there shall be substituted the words 'Koraput and Khondmals'; and

(iii) for the words 'either of those districts or in that sub-division,' in both places where those words occur, there shall be substituted the words 'in any of those districts.'

In sub-paragraph (*b*) of paragraph 3 of Part XII of the said Schedule after the words 'cultivates as a Hari' there shall be inserted the words 'or occupies as a tenant.'

PART II

Amendments of the Government of Burma Act, 1935

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